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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT LYONS,

Petitioner

VERSUS

UNITED STATES OF AMERICA,

Respondent

Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I.

DOES THE APPLICATION OF THE INSANITY STANDARD, AS NEWLY CREATED BY THE FIFTH CIRCUIT COURT OF APPEALS, RESULT IN A DENIAL OF LIBERTY WITHOUT DUE PROCESS OF LAW AND A VIOLATION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL IN VIOLATION OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

II.

DOES THE USE OF DIFFERENT STANDARDS FOR DETERMINING INSANITY WITHIN THE FEDERAL CIRCUIT COURTS DENY DEFENDANT EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY THE UNITED STATES CONSTITUTION, FIFTH AMENDMENT?

III.

DOES THE IMPOSITION OF SENTENCE, PURSUANT TO A CONVICTION RESULTING FROM THE USE OF THE FIFTH CIRCUIT'S NEWLY ESTABLISHED INSANITY TEST CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE RIGHTS PROTECTED BY THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

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OPINIONS BELOW

The Three-Judge Panel of the United States Court of Appeals for the Fifth Circuit rendered its opinion on April 22, 1983 at 704 F.2d 743 (1983). A copy of the court's decision is attached hereto as Appendix "A". The United States Court of Appeals for the Fifth Circuit granted a rehearing *en banc* on April 22, 1983 at 704 F.2d 748 (1983), and the opinion of that Court pursuant to the rehearing en banc was rendered on April 16, 1984 at __ F.2d __ (Doc. No. 82-3429 on April 16, 1984). Copies of the order for rehearing en banc and the court's decision *en banc* are attached hereto as Appendices "A-1" and "B". The United States District Court rendered its reason for ruling on the motion

in limine on May 19, 1982. A copy of the court's reasons for ruling are attached hereto as Appendix "C". The United States District Court rendered the judgment of conviction on July 7, 1982. A copy of the judgment is attached hereto as Appendix "D".

JURISDICTION

The *En Banc* decision of the Fifth Circuit Court of Appeals rendered April 16, 1984 vacated the defendant's conviction and remanded the case for a new trial in accordance with the new insanity standard. The jurisdiction of this Honorable Court is invoked pursuant to Title 28 United States Code, Section 1254(1).

BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The United States District Court for the Eastern District of Louisiana had jurisdiction over this matter as the federal offenses charged were committed within the Eastern District of Louisiana.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V [1791]

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 United States Code, Section 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

21 United States Code, Section 843 provides in pertinent part:

(a) It shall be unlawful for any person knowingly or intentionally—

(3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

STATEMENT OF THE CASE

Procedural History

On October 23, 1981, defendant, Robert Lyons, was indicted on twelve (12) counts of knowingly and intentionally securing controlled narcotic substances by misrepresentation,

fraud, deception and subterfuge. 21 U.S.C. §843(a)(3) and 18 U.S.C. §2. He advised the government of his intention to utilize a defense of mental disease or defect. Rule 12.2 F.R.C.P. The government then filed a motion *in limine* seeking to exclude the evidence which the defendant sought to introduce on the issue of mental disease. On May 10, 1982, the district court granted the government's motion *in limine,* and the defendant submitted a proffer of the evidence which he had sought to introduce concerning the issue of an insanity defense.

On June 7, 1982 the defendant waived his right to a jury trial and entered into a stipulation with the prosecution that "...the evidence to be offered by the government in the trial of [the] matter would support a finding of the guilt of the defendant Robert Lyons on each and every count of the evidence, absent the evidence proffered by the defendant." The defendant was guilty of each of the twelve (12) counts of the indictment and he was sentenced to one year in the federal penitentiary on counts one through six, which sentences were to run concurrently. On counts seven through twelve the defendant's sentence was suspended and the defendant was placed on probation for five years with the special condition that he was to participate in a federally directed drug treatment program. The defendant appealed his conviction and sentence to the United States Court of Appeals, Fifth Circuit. The conviction was vacated and the case remanded for a new trial. Defendant now applies to this Court for supervisory writs.

Statement of Facts

The defendant was hospitalized for various successive physical infirmities and as a result of this medical treatment he became involuntarily addicted to narcotics. The facts of

this case involve the defendant's involuntary drug addiction and the results of this condition.

These facts are presented in detail, in the defendant's proffer of evidence, the text of which appears in the opinion by the Fifth Circuit Court of Appeals, 704 F.2d 748 (1983). See Appendix "A".

HISTORY OF INSANITY DEFENSE: SUPREME COURT AND FIFTH CIRCUIT COURT OF APPEALS

The evolution of the test of insanity as utilized by the various courts of this nation has been long and arduous. The original test for insanity was developed in the courts of England and was later adopted in the United States. What later came to be known as the M'Naughten test for insanity was adopted by the House of Lords in 1843. *M'Naughten Case,* 10 Clark and F 199, 203, 210; 8 Eng. Rep. 718, 722, (1843). The test was formulated as follows:

> To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know what he was doing was wrong.

As far back as 1895, the United States Supreme Court recognized a form of the M'Naughten/irresistable impluse test of insanity. In the landmark case of *Davis v. United States,* 160 U.S. 469, 16 S.Ct. 353 at 354 (1895), also 165 U.S. 373, 17 S.Ct. 360, this Court defines "insanity" as follows:

> The term 'insanity' as used in this defense,

> means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing; or where, though conscious of the nature of the act, and able to distinguish between right and wrong, and know that the act is wrong, yet his will—by which I mean the governing power of his mind—has been, otherwise than voluntary, so completely destroyed that his actions are not subject to it, but are beyond his control.

The irresistable impulse rule was again tacitly approved by the Court in *Hotema v. United States,* 186 U.S. 413, 22 S.Ct. 895 (1902). The state of the Supreme Court's pronouncement on this issue has remained basically unchanged since that time. There has, however, been a flurry of activity within the nation's circuit courts on the subject and various standards, with varying results, have developed.

The Fifth Circuit Court of Appeals, feeling constrained by the dictates of *stari decisis,* at first refused to deviate from the test adopted by the United States Supreme Court in *Davis v. United States, supra.* Hence, in *Howard v. United States,* the Fifth Circuit noted:

> In the face of such recognition by the Supreme Court of a test of criminal responsibility, we do not feel at liberty to consider and decide whether in our opinion the recent modification of such test in the District of Columbia is sound or unsound, nor whether some other test should be adopted. This Circuit follows that law as stated by the Supreme Court and leaves any need for modification thereof to that Court, while the District of Columbia Circuit is entrusted with a considerable degree of autonomy with respect to law enforcement in the

> District. We, therefore, leave unchanged the test of criminal responsibility as thus established. 232 F.2d 274 at 275 (5th Cir. 1956).

However, in *Blake v. United States,* 407 F.2d 908 (5th Cir. 1969) the Fifth Circuit took a much different posture. The Fifth Circuit in *Blake, supra,* categorized the *Davis* pronouncement as "dictum" and therefore announced that it did not view *Davis* as a restriction against the circuit court's adoption of a new standard for testing insanity. Accordingly, in *Blake, supra* at 913, the Fifth Circuit adopted the Model Penal Code test:

> Section 4.01 of the ALI Model Penal Code is as follows:
>
> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminal [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
>
> (2) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

This test for insanity has thus remained the standard utilized within this circuit from 1969 until the instant. In the current case, this circuit adopted a definition of legal insanity which was a definition which had comprised one of the proposals presented to the American Bar Association House of Delegates in early 1983. The definition newly adopted by this circuit in *Lyons, en banc Rehearing, supra* at 3595, reads as follows:

> Consequently, we now hold that a person is not responsible for criminal conduct on the grounds of insanity only if at the time of the conduct, as a result of a mental disease or defect, he is unable to appreciate the wrongfulness of that conduct.

In adopting this standard, the Fifth Circuit, *en banc* overruled *United States v. Bass,* insofar as it held that mere drug addiction, whether voluntary or involuntary, constituted a mental disease for legal purposes. 490 F.2d 846 (5th Cir. 1974). Additionally, the court withdrew recognition of the volitional prong of the ALI insanity standard as set forth in *Blake, supra.*

It is the position of the defendant, Robert Lyons that the Fifth Circuit Court of Appeals erred in the establishment of this new insanity standard and that error, if not corrected, will result in a denial of his right to a fair trial, due process and equal protection of the law, as those rights are guaranteed by the Fifth Amendment of the United States Constitution. Further, any imposition of sentence pursuant to a conviction, resulting from implementation of this standard, will constitute cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

Defendant respectfully submits that this circuit has disregarded hundreds of years of moral, scientific and legal history and in an unfortunate and unwarranted reaction to the Hinckley verdict, has gone full circle—from M'Naughten back to a M'Naughten-type test of legal responsibility in cases of insanity. It is against this backdrop of events that defendant will discuss his legal grievances.

I.

THE APPLICATION OF THE FIFTH CIRCUIT'S NEWLY ESTABLISHED STANDARD FOR DETERMINING INSANITY WILL RESULT IN A DENIAL OF DUE PROCESS OF LAW AND THE DENIAL OF THE RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Defendant contends that the Fifth Circuit erred when it established the new test for judging insanity. The newly established test, which withdraws recognition of the volitional prong of the insanity test, denies the defendant due process of law because it results in the infliction of criminal responsibility in a situation where the accused has not willfully nor voluntarily done anything wrong. The Fifth Amendment provides in pertinent part:

> No person shall...be deprived of life, liberty, or property, *without due process of law*...(Emphasis supplied.)

The "due process" provision of the Constitution is an expression of rights which are fundamental and implicit in the concept of ordered liberty. U.S.C.A. Cons. Amend. 5, 14; *Rochin v. People of California,* 342 U.S. 165, 72 S.Ct. 205 (1952); *Snyder v. Commonwealth of Mass.,* 291 U.S. 97, 54 S.Ct. 330 (1933); *Palko v. State of Conneticut,* 302 U.S. 319, 58 S.Ct. 149 (1937). *See, Malinski v. People of The State of New York,* 324 U.S. 401, 65 S.Ct. 781 (1944). The fact that a practice is followed in a large number of states is not conclusive as to whether the practice comports with due process but it weighs heavily upon whether the practice offends a fundamental principle of justice. *Leland v. Oregon,* 343 U.S. 960, 72 S.Ct. 1002 (1952) *reh. den.,* 344 U.S. 848, 73 S.Ct. 4.

The concept of "due process" is rooted in the canons of decency and fairness which express the notions of justice of English speaking people. USCA Cons. Amend. 5, 14. *Rochin v. People of California, supra; Malinski v. People of the State of New York, supra.*

The courts, through the exercise of their supervisory power, are responsible for insuring that fundamental fairness is preserved. *United States v. Graves,* 556 F.2d 1319 (5th Cir. 1977).

The sanity of the accused is always an element of the offense charged. *Davis v. United States, supra.* There exists a presumption that all men are sane. *Davis v. United States, supra.* When the slightest evidence of the defendant's lack of capacity is presented, the burden shifts to the government to prove his sanity beyond a reasonable doubt. *United States v. Hall,* 583 F.2d 1288 (5th Cir. 1978); *United States v. Bass, supra.*

> Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and *choosing freely* to do wrong. (Emphasis supplied.) Pound, *Introduction to Sayre,* Cases on Criminal Law.

Therefore, according to the dictates of natural justice, in order for there to be guilt, there must exist, not only a wrongful act, but also a criminal intent. *Morissette v. United States,* 342 U.S. 246, 72 S.Ct. 240 (1952); *Davis v. United States, supra.* "Intent" has been defined as "will". *Black's Law Dictionary,* 5th Ed. (1979). Without a sound mind, intent can not exist. *Davis v. United States, supra.* Hence, under such a situation, the actor is no more responsible for his

acts than he would be for the acts of another man. *Davis v. United States, supra.*

When a man's life and liberty are at stake, elementary principles of justice necessitate an adjudication according to personal culpability and the seriousness of the crime. *Fisher v. United States,* 328 U.S. 463, 66 S.Ct. 1318 (1946), *reh. den.,* 329 U.S. 818, 67 S.Ct. 24.

Criminal responsibility is a legal, not a medical question. *Sauer v. United States,* 241 F.2d 640 (9th Cir. 1957), *cert. den.,* 354 U.S. 940, 77 S.Ct. 1405. Hence, an accused is entitled to acquittal of the specific crime charged if, upon all the evidence, there is reasonable doubt whether he was capable in law of committing the crime. *Leland v. Oregon, supra* citing *Davis v. U.S., supra.*

However, as fundamental as "will" and "free choice" are to the precepts of criminal law, these factors are not even considered under the new test of insanity, as established by the Fifth Circuit.[1] Since an intentional act is by definition an act of the will, it seems inconceivable that this aspect of the criminal act can be ignored (albeit, presumed). In essence, such an approach relieves the government of the responsibility of proving an essential element of the crimes charged. Since the element of free will is a fundamental consideration in criminal law, and in particular, in crimes of intent, to deny defendant an opportunity to prove that his acts were uncontrollable is to deny him due process of law.

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[1] Although the Fifth Circuit en banc panel did not deny that free will plays a part in the acts of men, they refused to allow this factor to be considered in a test for sanity. Their major concern was that there does not exist a sufficiently accurate scientific basis for measuring self-control nor for calibrating the impairment of man's capacity. Thus, a jury is forced to view the subject with blinders, for in this arena free of evidence the defendant's free will is being presumed.

II.

THE USE OF DIFFERENT STANDARDS FOR DETERMINING INSANITY WITHIN THE CIRCUIT COURTS OF THE FEDERAL SYSTEM, CONSTITUTES A DENIAL OF EQUAL PROTECTION AS GUARANTEED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The defendant contends that as a result of the stringent new test for insanity imposed upon him by the Fifth Circuit Court of Appeals that he is being denied equal protection of law as guaranteed by the Fifth Amendment. Within the unified federal system different tests for insanity have developed and they vary in their degrees of severity. That is, each circuit court of the federal system, except the Fifth Circuit, has adopted a form of the ALI Model Penal Code test for insanity. Thus, the Fifth Circuit stands alone, in a minority of one, as the only federal circuit court to adopt a M'Naughten-type test for insanity.

It is generally recognized that it is desirable that there exists uniformity of rule in the administration of criminal law within a government whose constitution recognizes the fundamental principles that are deemed essential for the protection of life and liberty. *See: Leland v. State of Oregon, supra; Davis v. United States, supra.* When the United States Constitution and general federal laws are involved, the administration of criminal justice becomes a matter of federal concern. *See: Fisher v. United States, supra.*

The equal protection guarantee of the United States Constitution is applied to the federal government by the Fifth Amendment. U.S.C.A. Const. Amend. 5. *Bolton v. Harris,* 395 F.2d 642 (D.C. 1968). Although absolute equality is not

required under the equal protection clause of the Fifth Amendment, there is traditionally a requirement for uniform treatment of persons standing in the same relation to the governmental action which is challenged. *Reynold v. Sims,* 377 U.S. 533, 84 S.Ct. 1362 (1964), *reh. den.,* 379 U.S. 870, 85 S.Ct. 12. *See: United States v. MacCollom,* 426 U.S. 317, 96 S.Ct. 2086 (1976). The crucial question in such a case is whether there exists an appropriate governmental interest which is suitably furthered by the differential in treatment. *Chicago Police Dept. v. Mosley,* 408 U.S. 92, 92 S.Ct. 2286 (1972). If the actions are patently arbitrary and bear no rational relationship to a legitimate governmental interest then the action violates the equal protection clause of the United States Constitution. *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764 (1973). The circumstances of each case will determine whether there has been a denial of equal protection. U.S.C.A. Const. Amend. 5. *See: Griffin v. County School Board of Prince Edward County,* 377 U.S. 218, 84 S.Ct. 1226 (1964).

In the instant case, the defendant, Robert Lyons, is being treated more severely than defendants similarly situated in other circuits of the federal system. Since he is being tried in the United States Fifth Circuit, he is saddled with an insanity test which gives no consideration to the volitional powers of his integrated mind. He is also confronted with the refusal of this circuit to recognize involuntary drug addiction as a disease for legal purposes. He is given a more onerous burden than defendants who, for example, are in a federal circuit which still recognizes the ALI Model Penal Code standard. The point is simply that the defendant is being treated differently from other defendants throughout the unified federal system and there exists no rational basis for this differentiation. To the contrary, there exists a compelling need for uniformity in this area of the law. The need for uniformity has long been

recognized and it was expressed by the Fifth Circuit when it adopted the Model Penal Code standard.

> There is much merit in not requiring a straitjacket charge but there is also merit in the idea of *uniformity*. We have concluded to adopt the Model Penal Code standard and to require it...as a matter of uniformity in this circuit. We think it lends itself as a uniform standard. (Emphasis supplied.) *Blake v. United States, supra* at 915.

Not only is there a need for uniformity within the circuit, but there is a more serious need for a uniform standard of insanity to be applied within the federal system as a whole.

This is a matter which may properly be addressed by Congress, but that body has refused to act and, to date, continues in its state of inertia. See, *Sauer v. United States, supra; Fisher v. United States, supra.* Hence, the various circuits are left to flounder without any guidance from a higher authority. Moreover, defendants are left to suffer the inequities which result from a disjunctive approach to a universal problem. Therefore, it is respectfully submitted that the current minority standard of the Fifth Circuit as applied to this defendant constitutes a denial of equal protection in violation of the safeguards afforded by the Fifth Amendment of the United States Constitution.

III.

THE IMPOSITION OF SENTENCE, PURSUANT TO A CONVICTION RESULTING FROM THE USE OF THE FIFTH CIRCUIT'S NEWLY ESTABLISHED STANDARD FOR DETERMINING INSANITY, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Defendant, Robert Lyons, further argues that any sentence imposed as a result of a conviction which would follow from the use of the Fifth Circuit's new insanity standard would result in the infliction of cruel and unusual punishment in violation of the Eighth Amendment. The United States Constitution, Eighth Amendment provides:

Amendment VIII [1791]

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The defendant will first review the background of the Eighth Amendment and the broad criterion necessary to present a successful attack upon a policy or practice as being violative of the Eighth Amendment. The defendant will next focus on the particular policy or practice under attack and the facts surrounding the case at Bar. The amendment was originally applied in cases which considered whether a particular punishment was barbaric. *Coker v. Georgia,* 433 U.S. 584, 97 S.Ct. 285 (1976); *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909 (1976); *Weems v. United States,* 217 U.S. 349, 30 S.Ct. 544 (1910). However, the courts have recognized that the Eighth Amendment is flexible and dynamic. *Gregg v. Georgia, supra; Weems v. United States, supra.* The Eighth Amendment was originally intended to act as a restriction on the Legislative Branch of Government. *Gregg v. Georgia, supra; Gore v. United States,* 357 U.S. 386, 78 S.Ct. 1280 (1958); *Robinson v. California,* 370 U.S. 664, 82 S.Ct. 1417 (1962); *Trop v. Dulles,* 356 U.S. 103, 78 S.Ct. 590 (1958); *In re: Kemmler,* 136 U.S. 447, 10 S.Ct. 930 (1890). It embodies broad and idealistic concepts of dignity and civilized standards of humanity and decency. *Jackson v. Bishop,* 404 F.2d 571 (5th Cir. 1968).

The burden is upon the one who would attack the validity of any particular form of punishment, as such punishment is presumed to be constitutionally valid. *Gregg v. Georgia, supra.*

It is generally recognized that the courts must be sensitive to insure that every safeguard is preserved when a defendant's life and liberty are at stake. *Gregg v. Georgia, supra.*

The courts may not require that the least severe penalty possible be the one which is selected, so long as the penalty actually selected is not clearly inhumane nor disproportionate to the crime involved. *Gregg v. Georgia, supra.*

In order to consider such an attack on Eighth Amendment grounds, the sentence must at least appear to be cruel and unusual. *United States v. Washington,* 578 F.2d 256 (1978); *United States v. Rivera-Marquez,* 519 F.2d 1227 (9th Cir. 1975), *cert. den.,* 423 U.S. 949, 96 S.Ct. 369 (1975). In accessing whether or not a particular penalty is "cruel and unusual", the courts will attribute great weight to the evolving standards of decency which mark the progress of a maturing society. *Coker v. Georgia, supra; Roberts v. Louisiana,* 428 U.S. 325, 96 S.Ct. 3001 (1976); *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978 (1976); *Trops v. Dulles, supra; Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285 (1977); *Gregg v. Georgia, supra. See: Louisiana ex rel Francis v. Resweler,* 392 U.S. 459, 67 S.Ct. 374 (1947). In determining whether a particular sentence is so "excessive" as to violate the Eighth Amendment of the United States Constitution, the courts will consider two basic factors: (1) whether the punishment is grossly out of proportion to the severity of the crime, and (2) whether the

results constitute an unnecessary and wanton infliction of pain. *Coker v. Georgia, supra; Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726 (1972); *Gregg v. Georgia, supra; Estelle v. Gamble, supra.*

In summary, this clause of the Constitution has always been considered to be directed at the method or kind of punishment imposed for the violation of a criminal statute. *Powell v. Texas,* 392 U.S. 514, 88 S.Ct. 2145 (1968), *reh. den.,* 393 U.S. 898, 89 S.Ct. 65.

Having reviewed the general evolution of the law concerning the Eighth Amendment, we now turn to the particular facts of this case.

The defendant Robert Lyons is charged with *knowingly* and *intentionally* securing controlled narcotic substances by misrepresentation, fraud, deception and subterfuge. (Emphasis supplied.) 21 U.S.C. 843(a)(3) and 18 U.S.C. §2. The crimes charged require the element of specific intent. These crimes occurred during a time when the defendant was suffering from iatrogenic drug addiction. The proffered evidence will show that as a result of this condition the defendant could not conform his conduct to the requirements of law, insofar as refraining from securing drugs. In this regard, he lacked control and the freedom of choice.

This Court has had occasion to address a similar issue in the case of *Powell v. Texas, supra.* In that case the defendant was charged with public drunkeness, and he argued that his condition was occasioned by a compulsion symptomatic of the disease of chronic alcoholism and thus, his behavior lacked the critical element of *mens rea.* Therefore, he contended that any punishment under this

set of facts would violate the Eighth Amendment prohibition against cruel and unusual punishment. In rejecting his argument the majority found that the state of the record was insufficient to support the defendant's claims.

Certain members of this Court did, however, recognize that one addicted to alcohol is "powerless to avoid criminal guilt" and thus, is "powerless to choose not to violate the law". *Powell v. Texas, Id.* at 2172. Thus, the conclusion reached by the plurality dissent in the *Powell* case is particularly apposite here. They reasoned as follows:

> But here the findings of the trial judge call into play the principle that a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease. This principle, narrow in scope and applicability, is implemented by the Eighth Amendment's prohibition of "cruel and unusual punishment," as we construed that command in *Robinson.* It is true that the command of the Eighth Amendment and its antecedent provision in the Bill of Rights of 1689 were initially directed to the type and degree of punishment inflicted. But in *Robinson* we recognize that "the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick." *Powell v. Texas, Id.* at 2172-2173, citing *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417 (1962).

This Court has long recognized that persons addicted to narcotics "are diseased and proper subjects for [medical] treatment." *Linder v. United States,* 268 U.S. 5 at 18, 45 S.Ct. 446 at 449 (1925).

In *Robinson v. California, Id.,* this Court found that a Texas statute was unconstitutional because it sought to punish a defendant for the criminal offense of being addicted to the use of narcotics. In finding that the statute violated the Eighth Amendment of the Constitution, the United States Supreme Court presented the following analogy:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a vevereal disease...
>
> But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments...
>
> We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness. *Indeed, it is apparently an illness which may be contracted innocently or involuntarily. ...To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crimes" of having a common cold.* (Emphasis supplied.) *Robinson v. California, Id.* at 1420-1421.

Therefore, if it is repugnant to the principles of our Constitution to punish someone for a recognized illness. defendant would respectfully submit that it is just as reprehensible to foster a policy which would punish someone for his actions where those actions arise out of and

are a direct concomitant of a recognized illness, particularly where those actions are uncontrollable.

Moreover, the facts of this case are more egregious than those of *Powell, supra*, or *Robinson, supra*, because in the instant case, under the new Fifth Circuit test for insanity, the defendant will be all but precluded from presenting the facts of his addiction to the jury. Thus, he will be punished for an offense for which he is morally blameless. In essence he will be punished for holding a certain "status", that is, that of a drug addict.

Furthermore, "the evolving standard of decency" of current society recognizes the fact that none of the three asserted purposes of criminal law—rehabilitation, deterrence and retribution—are satisfied when the truly irresponsible, those who lack substantial capacity to control their actions, are punished. *United States v. Freeman*, 357 F.2d 606 (2nd Cir. 1966); *Sauer v. United States, supra.*

As most aptly stated in *Sauer, supra* at 648:

> Whatever we may conclude to be the objectives of the criminal law, the traditional result has been punishment. Functioning under such a system, our society does not assess punishment where it cannot ascribe blame. It is inimical to the morals and ideals of an organized social order to impose punishment where blame cannot be affixed. Man is regarded as a moral being. Modern psychiatry to the contrary, the criminal law is grounded upon the theory that, in the absence of special conditions, individuals are free to exercise a choice between possible courses of conduct and hence are morally responsible. Thus, it is moral guilt that the law stresses.

> At least one purpose of the penal law is to express a formal social condemnation of forbidden conduct, and buttress that condemnation by sanctions calculated to prevent that which is forbidden. The ultimate goal is deterrence. In attempting to achieve this end we employ means which secondarily satisfy the retributive feelings of society. Any theory of criminal responsibility must be evolved in light of these purposes, else it will be unacceptable to some considerable segment of society.

Thus, to impose punishment on one who is morally blameless and who cannot hope to benefit from the imposition of the punishment is an unnecessary and wanton infliction of pain which is violative of the Eighth Amendment's prohibition against cruel and unusual punishment.

CONCLUSION

When the issue of insanity arises in a criminal trial, "the most fundamental fabric of American jurisprudence goes on trial." *See: United States v. Bass, supra.* Defendant therefore urges this Court to speak out on the issue and render guidance in an area of the law which is fraught with problems and injustice resulting from uncertainty.

The reluctance of this Court to set a constitutional standard for insanity is recognized. *Powell v. Texas, supra.* This Court, in *Powell* expressed the concern that "a constitutional rule would reduce, if not eliminate...fruitful experimentation, and freeze the productive dialogue between law and psychiatry into a rigid constitutional mold", *supra* at 2156. This Court simply felt, that in 1968, "it was not yet time" to formulate a standard, as too much was unclear to doctors and lawyers. It is respectfully argued that the time

is now right to provide at least a threshold rule concerning criminal responsibility in insanity cases. The rule would not have to be so rigid as to negate growth. Certainly knowledge in this area is not so undeveloped as to prevent formulation of at least a threshold standard. After all, this area has been evolving since the earliest times of our judicial system. The need for guidance is best illustrated by the course taken by the Fifth Circuit in this area. That is, it has traveled full circle from M'Naughten to a type of M'Naughten standard and it seems no more certain today than when the subject was first addressed.

Moreover, it is respectfully submitted that the criticisms which lead to the initial rejection of the M'Naughten-type test for insanity are as viable today as they were when the ALI/Model Penal Code definition of insanity was adopted. That is, the major deficiency of the M'Naughten test, and those modeled after it, is that the test is too narrow in scope. *United States v. Freeman, supra.* It failed to view human personality as a fully integrated system and in this regard the test was unrealistic because the mental institutions of this nation are filled with persons who can distinguish right from wrong but who cannot control their actions. *United States v. Freeman, supra; Sauer v. United States, supra.*

Furthermore, the M'Naughten-type tests constrict and artificially structure the expert testimony provided by the psychiatrist, and such testimony elicited pursuant to this test has been labeled by some to be "professional perjury". *United States v. Freeman, supra.*

Additionally, the ultimate transgression in such an approach is that the deciders of men's life and liberty—i.e., the judge and jury—will be deprived of information which

is vital to their final decision. *United States v. Freeman, Ibid.* It is due to these serious and pervasive shortcomings of the test that Mr. Justice Cardozo observed "the...definition of insanity has little relation to the truths of mental life" and Mr. Justice Frankfurter categorized it as a "sham". *United States v. Freeman, Id.* It is conceded that medicine is not an exact science and it is because of this that many difficulties arise when a medical/legal definition must be formulated. *See: Sauer v. United States, supra.* However, it is respectfully submitted that censorship is not the answer to the dilemma.

The question of intent or criminal responsibility has traditionally been left to the jury to resolve as a question of fact. *Morissette v. United States, supra.* Thus, it is the function of the court to develop a standard of criminal responsibility based on the moral and ethical standards of the community and it is for the jury to determine if the accused suffers from a mental disorder and if his affliction meets the criteria established by the court. *Sauer v. United States, supra.* Choice of a test of legal responsibility involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility. *Leland v. United States, supra.*

"Only by integrating scientific advancement with our ideals of justice can law remain a part of the living fiber of our civilization." *Fisher v. United States, supra* at 1333. Legal tests of criminal insanity are not and can not result from scientific analysis nor objective judgment for there is no objective standard by which an abnormal offender can be measured. *Holloway v. United States,* 148 F.2d 665 (3rd Cir. 1950), *cert. den.,* 334 U.S. 852, 68 S.Ct. 1507. Rather they must be based upon the instinctive sense of justice of

ordinary men. *Holloway v. United States, Id.* The aim in establishing such a test is to avoid restricting it to particular symptoms, and to permit as broad an inquiry as may be found in keeping with accepted scientific criteria. *Sauer v. United States, supra.* To facilitate this aim, there should be a free flow of information so that the fact finders can make a knowing and intelligent decision. It is at least persuasive that in this Court's only pronouncement on the subject, it recognized a volitional prong to the test for insanity. *Davis v. United States, supra.* To date, there has been no positive scientific showing that volition (i.e., will) does not play a part in the intentional acts of man. Rather, man's will is a fundamental and integral part of his personality, and as such is an essential element of every act, criminal or otherwise. Even the en banc decision of the Fifth Circuit does not deny the part that free will plays in man's actions. Rather, it is conceived that this aspect of man's personality can not be accurately measured. Accordingly, this vital element of man's personality should be a major consideration in evaluating his culpability. To adjudge one guilty of a criminal act where there is no exercise of free will is to frustrate the fundamental precepts of fairness and due process upon which this ordered society is founded.

Since the new insanity test established by the Fifth Circuit Court of Appeals violates the defendant's rights to due process, equal protection and a fair trial under the Fifth Amendment; and will result in cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution, it is respectfully suggested that this Court should act to correct the error fostered by the lower court's decision.

WHEREFORE, it is respectfully submitted that for

the reasons assigned herein, this Honorable Court should grant the relief requested by issuing the instant Writ of Certiorari.

MURRAY, MURRAY, BRADEN,
LANDRY & GONZALEZ

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Attorney for Robert Lyons,
Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Petition for Writ of Certiorari have been served on Harry W. McSherry, Assistant United States Attorney, Hale Boggs Federal Building, 500 Camp Street, New Orleans, Louisiana 70130, this 15th day of June, 1984.

JULIAN R. MURRAY, JR.

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 82-3429

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROBERT LYONS,

Defendant-Appellant.

Appeal From the United States District Court
For the Eastern District of Louisiana

(APRIL 22, 1983)

Before GARZA, POLITZ, and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

On October 23, 1981, Robert Lyons, former Sheriff of Washington Parish, Louisiana, was indicted on twelve counts of knowingly and intentionally securing controlled narcotics by misrepresentation, fraud, deception and subterfuge, violations of 21 U.S.C. § 843(a)(3) and 18 U.S.C. § 2. Prior to trial, Lyons informed the Assistant U.S. Attorney that he intended to rely on a defense of insanity: *See* Fed.R.Crim.P. 12.2(b). Specifically, Lyons argued that his

"actions were not willful and voluntary because he was suffering from the mental disease and defect of [involuntary] drug addiction as a result of which he lacked substantial capacity to conform his conduct to the requirements of law." In response to the Government's motion in limine, the district court excluded any evidence of Lyons' drug addiction defense. Lyons objected to the trial court's ruling and submitted a proffer of evidence setting forth the specific evidence he relied upon in support of his defense.

Whether the district court properly excluded Lyons' proffered insanity defense is the sole issue before this Court. Constrained by the shackles of precedent, we hold that the district court erred by refusing to allow Lyons to present his insanity defense to the jury. However, we emphasize that we express no opinion as to the proper resolution of this most difficult fact issue upon remand. Whether or not Lyons' involuntary drug addiction constitutes a mental disease or defect that deprived him of the substantial capacity to conform his conduct to the requirements of the law on the dates of the charged offenses is an issue best left to the reasoned consideration of a properly charged jury.

I. *Lyons' Proffer of Evidence*

As noted previously, the district court ruled in a pretrial hearing that Lyons would not be allowed to present evidence to the jury concerning his involuntary drug addiction. Deprived of his sole defense by the district court's ruling, the defendant stipulated that "...the evidence to be offered by the government in the trial of [the] matter would support a finding of guilt of the defendant Robert Lyons on each and every count of the indictment, absent the evidence proffered by the defendant." *See* Record, vol. I at

193-194. Lyons reoffered his proffer of evidence, the district court stood by its previous ruling, and, consequently, Lyons waived his right to a jury trial and was sentenced to one year on each of Counts 1 through 6, the sentences to run concurrently, and to five years probation on Counts 7 through 12 with the requirement that he participate in a drug treatment program. Lyons appealed to this Court alleging that the trial court erred by excluding his proffered defense. The resolution of this issue, of course, requires examination of Lyons' proffered defense. Hence, we set forth Lyons' proffer in full.

> In the beginning of the year 1978, the defendant Robert Lyons (hereinafter Lyons) was living in Bogalusa, Louisiana, employed as a juvenile officer by the City of Bogalusa. He was a college graduate, married, and he had three children. He was generally in good health except that he suffered from occasional severe stomach pain, nausea, and vomiting. This condition got worse, and in May of 1978, between May 18 and May 29, he was admitted to the hospital where he was diagnosed as having a probable ulcer. He received narcotic analgesics during this stay in the hospital but ceased using them after his discharge.
>
> On August 21, 1978, through August 26, 1978, Lyons was again hospitalized, this time for surgery on internal hemorrhoids. During this stay in the hospital he was given Percodan and injections of Demerol. Upon being discharged from the hospital he was given a prescription for Percodan which he had filled and took as needed for pain.
>
> In addition to the residual pain from his hemorrhoidectomy, Lyons experienced increased stomach pain, nausea, and vomiting, and was

readmitted to the hospital on October 7, 1978, remaining there through October 18, 1978. During this stay in the hospital he received numerous tests and in addition was given substantial quantities of Percodan, Demerol, Mepergan (a combination of Demerol and anti-nausea medicine). He was discharged from the hospital on this occasion with the diagnosis of an ulcer. Among other medicines, he was given a prescription for Percodan to be taken as needed for pain.

His symptoms grew progressively worse and he had to be readmitted nine days later on October 27, 1978, remaining in the hospital through November 5, 1978. In addition to his other symptoms, the defendant was also running a high fever and while in the hospital he was diagnosed as having a perforated appendix which could not immediately be operated on because of the fear of peritonitis. During this stay in the hospital, the defendant was again given large quantities of Percodan, Demerol and Mepergan. When he was discharged on November 5, 1978, he again was given a prescription for Percodan to take as needed for pain.

While recuperating at home (and while under the influence of the Percodan which he was taking) he was cleaning a pistol which accidently discharged, wounding him in the left side. He was therefore readmitted to the hospital on November 17, 1978. While the gunshot wound was not particularly serious in and of itself, the defendant was due to have an appendectomy and it was determined to keep him in the hospital for that purpose. He stayed in the hospital between November 17 and November 29, 1978, for the gunshot wound and the appendectomy. During this period he was again given substantial quantities of Percodan, Demerol, and Mepergan. Upon

discharge from the hospital on this occasion, the defendant was again given a prescription for Percodan to take as needed for pain.

Around the end of December of 1978, or the beginning of January, 1979, Lyons' treating physician determined not to give him any more Percodan because he was concerned about the possibility of addiction. Up until that time the defendant had constantly been on Percodan and/or Demerol and/or Mepergan since his hospitalization for hemorrhoids on August 21, 1978. All three of said drugs are highly addictive. Because he continued to suffer substantial stomach pain, Lyons went to another physician, Dr. Glenn Hebert, who advised him that his previous doctor had been wrong to have taken him off of the Percodan and prescribed additional Percodan for Lyons. Dr. Herbert continued to prescribe Percodan for Lyons in constantly increasing amounts during the year 1979.

Lyons became concerned about the difficulty he had functioning when he was not taking Percodan. He inquired of Dr. Hebert if there was any cause for concern. Dr. Hebert assured him that in the course of his medical experience he had had occasion to deal with and treat drug addicts and that Lyons had nothing to be concerned about. On June 15, 1979, Lyons resigned his position with the City of Bogalusa to run for the office of Sheriff for Washington Parish. He was elected to that office in December of 1979.

Around the end of 1979 or the beginning of 1980, Lyons began to develop severe headaches in addition to the stomach pain. Dr. Hebert then prescribed Talwin tablets, another narcotic drug that is highly addictive. The headaches got progressively worse and Lyons underwent surgery in

May, 1980, for a deviated septum that was thought to be the possible cause of his headaches. However, following surgery the headaches did not subside and the stomach pain became progressively worse.

In July or August of 1980, Lyons' nausea became so severe that he could no longer take the Talwin tablets orally and had to take it by injections. In late November or early December, 1980, Dr. Hebert began to supply Lyons with Demerol injections. At times Dr. Hebert would simply supply to Lyons the drugs and the syringes used to inject them, and at other times, he would have Lyons go to the local hospital emergency room for injections.

By this time, Lyons' family had discovered that he had a serious drug problem and they had taken measures to try to get him free of drugs. Lyons' wife and his family physician who had previously treated him in 1978 both spoke with Dr. Hebert to warn him about the seriousness of the problem and the possible repercussions. While Dr. Hebert did not cut Lyons off from drugs, he did explain to Lyons that they would have to use more devious means of securing the drugs. Dr. Hebert, in the beginning of October, 1980, put a fake cast on Lyons' leg so that his family and the public would believe he had a broken leg, and therefore a legitimate reason for taking the drugs which Dr. Hebert was supplying. During the middle of October, 1980, Dr. Hebert recommended to Lyons that because he was the sheriff, it would be possible for him to get local doctors to write prescriptions for drugs ostensibly to be used in law enforcement undercover narcotics cases, but in actuality to be used by Lyons to satisfy his drug needs. And indeed, by this time, Lyons had a tremendous need for drugs, and on the occasions

when he could not get them, he suffered great physiological and psychological pain to the extent that he felt a complete inability to refrain from using them.

Accordingly, beginning around the middle of October, 1980, and at various times through the middle of August, 1981, when Lyons was unable to get drugs from Dr. Hebert, he would go to various doctors in the community and secure prescriptions from them under the guise of using the drugs for law enforcement purposes.

In the beginning of 1981, Lyons' family had him hospitalized on two different occasions in an effort to detoxify him, but in both instance he would have deputies bring drugs to him in the hospital. His use of Demerol constantly increased, until finally in August of 1981, he was living almost exclusively for and on Demerol. He was unable to eat any food and consequently had lost over forty (40) pounds and was suffering drastically from malnutrition.

On August 19, 1981, after giving himself a Demerol injection, Lyons had a toxic reaction and went into convulsions. His decalcified bones had become so brittle that during the course of the convulsion he broke three ribs, three vertebrae, and his left hip was completely torn from the socket.

His family then had him committed to DePaul's Hospital where he remained for three days in excruciating pain because the doctors, not realizing that he had the orthopedic injuries, believed his cries of pain were simply exaggerated efforts to get drugs. After three days he was finally taken to Touro Hospital where x-rays disclosed the extent of his injuries and he was operated on for his hip.

He was returned home to recuperate from his hip surgery before being returned to DePaul Hospital for treatment of his drug addiction. Even while he was home and incapacitated he had his deputies take him to various hospital emergency rooms to get Demerol injections.

However, when news of his addiction became public, the doctors whom he had previously duped, of course ceased to supply him with any more narcotics, and ultimately after thirty-five days in DePaul's Hospital he was finally detoxified and weaned from the drugs. Since that time he has received expert counseling and, at the request of his attorney, his physicians require urinalysis and have been able to verify that Lyons remains drug free.

The above facts can be attested to by Lyons and can be corroborated by his wife, friends, employees, his original treating physician, as well as by the hospital and prescription records. These witnesses can not only testify to the particular facts outlined above, but also to the complete change in personality that was exhibited by Lyons during the latter stages of his drug addiction.

In addition to the lay witnesses, the defense would present as expert witnesses, Dr. Doyle Smith, and Dr. C. B. Scrignar. Both of these physicians are recognized as experts in the diagnosis and treatment of drug addiction. Dr. Smith and Dr. Scrignar will testify, in their expert opinion, that at the times of the offenses alleged in the indictment, the defendant's drug addiction was a mental disease or defect that caused him to lack the substantial capacity to conform his conduct to the requirements of law. They would explain that drug addiction affects

> the brain both physiologically as well as psychologically. Recent studies have shown that chronic drug use physically affects the sensors of the brain. This results in a loss of judgment, a markedly increased sensitivity to pain, and a perceived "need" by the brain to be supplied with additional drugs which is very much akin to the brain's need for oxygen.
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> Because of the drug's affect (sic) on the brain, a person in the advanced state of drug addiction does not have any choice as to whether he takes drugs. Unless and until he becomes completely detoxified, the drug addict's need for more drugs is as compelling as any motivation known to man. Indeed, they would note that the defendant's advanced state of malnutrition and physical deterioration is an example of how the brain requires drugs, even at the expense of life itself.

We now turn to the resolution of the sole issue before this Court.

II. *Lyons' Proffer of Evidence and the Defense of Insanity*

It is well established that the sanity of the accused is always an element of the offense charged. It is equally well established that the defendant is presumed sane, "and where no evidence to the contrary is presented, that presumption is wholly sufficient to satisfy the required proof that the defendant is sane, and hence responsible for his actions." *United States v. Bass,* 490 F.2d 846, 850 (5th Cir. 1974); *Mimms v. United States,* 375 F.2d 135, 140 (5th Cir. 1967). However, should the defendant produce even *slight* evidence tending to prove his insanity at the time of the alleged offense, the Government has the burden of proving the defendant's sanity beyond a reasonable doubt. *Blake v.*

United States, 407 F.2d 908, 911 (5th Cir. 1969) (*en banc*).[1] Whether Lyons' proffer constitutes slight evidence tending to prove his insanity at the times of the alleged offenses in accordance with existing precedent is, therefore, the critical inquiry.

Initially, we note that we do not write on a clean slate. In *Blake*, this Court set forth the applicable standard to be utilized in the Fifth Circuit when a defendant's sanity is put at issue. The Court stated:

> A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct, *or to conform his conduct to the requirements of law.*

Blake, 407 F.2d at 916 (emphasis added).[2] Additionally, this Court has held that involuntary drug addiction may constitute a "mental disease or defect" bearing on the defendant's criminal responsibility. *United States v. Bass*, 490 F.2d 846 (5th Cir. 1974).[3] In *Bass*, a case strikingly

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[1] Of course, "[t]he question of sufficiency of the evidence necessary to make an issue for the jury on the defense of insanity as well as whether the evidence establishes as a matter of law a reasonable doubt as to a defendant's sanity is for the court." *Blake*, 407 F.2d at 911. However, as noted, once *slight* evidence tending to put the defendant's sanity in issue is presented to the court, the sanity issue must be presented to a properly charged jury.

[2] The standard announced in *Blake* is substantially similar to the standard set forth in the American Law Institute's Penal Code. *See* ALI Model Penal Code § 4.01; *Blake*, 407 F.2d at 913-14.

[3] Apparently, neither the prosecution nor the defense was aware of this case during the proceedings below. The panel first brought this case to counsel's attention prior to oral argument. Had counsel made this case available to the district court, this appeal probably would have been unnecessary.

similar to the case at bar, this Court concluded that evidence of involuntary drug addiction could, and did in the particular circumstances of that case, constitute relevant evidence on the issue of the defendant's sanity. In *Bass,* as in the instant case, the defendant was charged, *inter alia,* with obtaining narcotics by misrepresentation, deception, fraud, and subterfuge. More importantly, *Bass* and the case *sub judice* both dealt with defendants *involuntarily* addicted to the narcotics they illegally obtained. In *Bass,* the defendant had become involuntarily addicted to Demerol as a result of medical treatment aimed at alleviating the defendant's regional enteritis, an acutely painful disease of the lower gastro-intestinal tract. *Bass,* 490 F.2d at 849.

In the instant case, the defendant's proffer indicates that Lyons became involuntarily addicted to pain medication, including Demerol, as a result of medical treatment designed to alleviate the barrage of illnesses suffered by Lyons during the three-year period prior to the commission of the charged offenses. No meaningful distinction between *Bass* and the case *sub judice* can be discerned. In both cases, the defendant embarked upon a course of narcotics use not by choice, but pursuant to doctor's orders—orders presumably aimed at treating an admittedly painful physical disorder. Additionally, in both cases, the defendant offered expert testimony, which, if believed by the jury, would establish that the defendant lacked substantial capacity to conform his conduct to the requirements of applicable law due to his involuntary drug addiction.[4]

[4] Lyons proffer indicates that two expert witnesses were willing to testify concerning Lyons' involuntary drug addiction. In fact, Lyons maintained in his proffer that both experts would testify that Lyons' drug addiction "was a mental disease or defect that caused him to lack the substantial capacity to conform his conduct to the requirements of

Finally, we note that in *Bass*, this Court held that such evidence presented a fact issue for the jury, albeit, a fact issue to be guided and confined by the legal standards set forth in *Blake*. In light of this precedent, this case must be reversed and remanded so that Lyons' insanity defense may be presented to a jury.

We stress the limited nature of our holding. We do not hold that Lyons is not to be held responsible for his criminal conduct or that mere allegation of drug addiction is a *per se* defense to a criminal proceeding. Moreover, we have no occasion to determine whether voluntary drug addiction constitutes a defense. Quite simply, we hold that the particular circumstances of this case, in light of this Court's prior holdings in *Blake* and *Bass*, require the district court to allow Lyons to submit his involuntary addiction defense to a jury.

As this opinion indicates, the members of this panel are bound by the legal standards set forth in *Blake* and *Bass*. Whether these decisions should be altered or changed is not an issue properly before this panel; *en banc* consideration

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(Footnote 4 continued)
law." *See* Lyons' Proffer, pages 9-10, *supra*. Although we recognize that Lyons' was allowed to write with a free hand when he prepared his proffer of evidence, it is not possible to conclude that this proffered testimony does not constitute slight evidence placing Lyons' sanity in issue. Indeed, we note that in *Bass*, a case indistinguishable from the instant case, involving evidence strikingly similar to the evidence proffered by Lyons, this Court not only held that the defendants' evidence had created a fact issue for the jury, but remanded the case to the district court and noted that the defendant would be entitled to a directed verdict of acquittal unless the government was able to present sufficient evidence to carry its burden on the issue of the defendants' sanity. *Bass*, 490 F.2d at 852. Whether Lyons' proffer accurately presents the facts of Lyons' case is a determination best left to a jury's perceptive consideration.

would be necessary to change the legal standards applied by this panel in the case *sub judice*.[5]

For the foregoing reasons, the district court's decision is reversed and the case is remanded for a new trial in accordance with this opinion.

REVERSED AND REMANDED.

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[5] Perhaps the best description of the *Blake* test and the problems attendant thereto was set forth in *Bass*. The Court stated:

> The test which we announced in *Blake* does not require that the mental disease or defect be a permanent one. The disease or defect may be permanent or temporary as long as the requirements of the test are otherwise met. When the issue of insanity arises in the trial of a criminal case, the most fundamental fabric of American jurisprudence also goes on trial. For in that case, the basis of criminal responsibility is examined. That examination has always involved a difficult accommodation between legal and moral precepts on one hand and medical theory and fact on the other. Human action rarely admits of simple explanation; where the criminal case presents no issue of insanity, the presumption of sanity and our objective assessment of the facts of the crime "explain" the conduct. But where the defendant's sanity is before the court, we are required to perform a most difficult task. To engage in a debate on the permanency or lack of permanency of the mental disease or defect would plunge this branch of the law into the Serbonian Bog of which Cardozo warned us, if we are not already there.

Bass, 490 F.2d at 851.

APPENDIX "A-1"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3429

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT LYONS,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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SUGGESTION FOR REHEARING EN BANC

(Opinion April 22, 1983, 5 Cir., 198__, __ F.2d __)

(July 8, 1983)

Before CLARK, Chief Judge, BROWN, GEE, RUBIN, GARZA, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

A member of the Court in active service having

requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc.

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX "B"

UNITED STATES of America,

Plaintiff-Appellee,

v.

Robert LYONS,

Defendant-Appellant.

No. 82-3429.

United States Court of Appeals,
Fifth Circuit

April 16, 1984.

Defendant was convicted in the United States District Court for the Eastern District of Louisiana at New Orleans, Edward J. Boyle, Sr., J., of knowingly and intentionally securing controlled narcotics by misrepresentation, fraud, deception and subterfuge. The conviction was reversed and the case remanded, 704 F.2d 743. On rehearing en banc, the Court of Appeals, Gee, Circuit Judge, held that: (1) evidence of mere narcotics addiction, without other physiological or psychological involvement, raises no issue of such mental defect or disease as can serve as basis for insanity defense; (2) person is not responsible for criminal conduct on grounds of insanity only if at time of that conduct, as result of mental disease or defect, he is unable to appreciate wrongfulness of that conduct; but (3) where defendant asserted by his proffer of evidence that his drug addiction had caused physiological damage to his brain and that such damage caused him to lack substantial capacity to conform his conduct to requirements of the law, he should have been allowed, under then existing test, to introduce evidence of any physical brain damage and consequent mental disease or defect, insofar as proffer of evidence tended to suggest such damage.

Vacated and remanded.

Alvin B. Rubin and Jerre S. Williams, Circuit Judges, filed opinion concurring in part and dissenting in part, in which Politz, Tate and Patrick E. Higginbotham, Circuit Judges, joined.

Johnson, Circuit Judge, dissented and filed opinion.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CLARK, Chief Judge, BROWN, GEE, RUBIN, GARZA, REAVLEY, POLITZ, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges.*

Gee, Circuit Judge:

Defendant Robert Lyons was indicted on twelve counts of knowingly and intentionally securing controlled narcotics by misrepresentation, fraud, deception and subterfuge in violation of 21 U.S.C. § 843(a)(3) (1976) and 18 U.S.C. § 2 (1976). Before trial Lyons informed the Assistant United States Attorney that he intended to rely on a defense of insanity: that he had lacked substantial capacity to conform his conduct to the requirements of the law because of drug addiction. *See* Fed.R.Crim.P. 12.2(a). Lyons proffered evidence[1] that in 1978 he began to suffer

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* Judges Randall and Davis did not participate in the consideration or decision of this case.

[1] Lyons' proffer of evidence is reproduced in its entirety in the panel opinion. 704 F.2d at 744-47. We merely summarize it here.

from several painful ailments, that various narcotics were prescribed to be taken as needed for his pain, and that the became addicted to these drugs. He also offered to present expert witnesses who would testify that his drug addiction affected his brain both physiologically and psychologically and that as a result he lacked substantial capacity to confrom his conduct to the requirements of the law.

In response to the government's motion *in limine*, the district court excluded any evidence of Lyon's drug addiction, apparently on the ground that such an addiction could not constitute a mental disease or defect sufficient to support an insanity defense. A panel of this Court reversed, holding that it was the jury's responsibility to decide whether involuntary drug addiction could constitute a mental disease or defect depriving Lyons of substantial capacity to conform his conduct to the requirements of the law. *United States v. Lyons*, 704 F.2d 743 (5th Cir.1983). We agreed to rehear the case en banc. *Id.* at 748.[2]

I.

For the greater part of two decades our Circuit has followed the rule that a defendant is not to be held criminally responsible for conduct if, at the time of that conduct and as a result of mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of his conduct *or to conform his conduct to the requirements of the law. Blake v. United States*, 407 F.2d 908, 916 (5th Cir.1969) (en banc).

[2] For the en banc hearing we invited interested groups to submit amicus briefs. Several were received, including briefs from the American Bar Association, American Psychological Association, and the National Association of Criminal Defense Lawyers, for all of which we are obliged.

Today the great weight of legal authority clearly supports the view that evidence of mere narcotics addiction, standing alone and without other physiological or psychological involvement, raises no issue of such a mental defect or disease as can serve as a basis for the insanity defense. *Bailey v. United States*, 386 F.2d 1, 3-4 (5th Cir.1967), *cert. denied*, 392 U.S. 946, 88 S.Ct. 2300, 20 L.Ed.2d 1408 (1968). *Accord, United States v. Coffman*, 567 F.2d 960, 963 (10th Cir.1977); *United States v. Moore*, 486 F.2d 1139, 1181 (D.C.Cir.) (en banc), *cert. denied*, 414 U.S. 980, 94 S.Ct. 298, 38 L.Ed.2d 224 (1973); *United States v. Stevens*, 461 F.2d 317, 321 (7th Cir.1972); *Gaskins v. United States*, 410 F.2d 987, 989 (D.C.Cir.1967); *Green v. United States*, 383 F.2d 199, 201 (D.C.Cir.1967), *cert. denied*, 390 U.S. 961, 88 S.Ct. 1061, 19 L.Ed.2d 1158 (1968); *United States v. Freeman*, 357 F.2d 606, 625 (2d Cir.1966); *Berry v. United States*, 286 F.Supp. 816, 820 (E.D.Pa.1968), *rev'd on other grounds*, 412 F.2d 189 (3d Cir.1969). *Cf. United States v. Romano*, 482 F.2d 1183, 1196 (5th Cir.1973), *cert. denied sub nom. Yassen v. United States*, 414 U.S. 1129, 94 S.Ct. 866, 38 L.Ed.2d 753 (1974) (being involuntarily under the influence of drugs at the time of the crime is not a legal equivalent of insanity. *See also* Fingarette, *Addiction and Criminal Responsibility*, 84 Yale L.J. 413, 424-25 (1975) ("there is no consensus in the medical profession that addiction is a mental disease").[3]

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[3] This rule is consistent with holdings that use of narcotics does not per se render a defendant incompetent to stand trial, *Lewis v. United States*, 542 F.2d 50, 51 (8th Cir.), *cert. denied*, 429 U.S. 837, 97 S.Ct. 105, 50 L.Ed.2d 103 (1976); *United States v. Williams*, 468 F.2d 819, 820 (5th Cir.1972); *Gennett v. United States*, 403 F.2d 928, 931 (D.C.Cir.1968), and that mere alcoholism does not constitute a mental disease or defect warranting an insanity instruction, *Powell v. Texas*, 392 U.S. 514, 535, 88 S.Ct. 2145, 2155, 20 L.Ed.2d 1254 (1968); *United States v. Shuckahosee*, 609 F.2d 1351, 1355 (10th Cir. 1979), *cert. denied*, 445 U.S. 919, 100 S.Ct. 1283, 63 L.Ed.2d 605 (1980); *United States v. Malafronte*, 357 F.2d 629, 632 n. 8 (2d Cir.1966).

There are a number of reasons why. In the first place, there is an element of reasoned choice when an addict knowingly acquires and uses drugs; he could instead have participated in an addiction treatment program. *Moore*, 486 F.2d at 1183 (opinion of Leventhal, J.). A person is not to be excused for offending "simply because he wanted to very, very badly." *Bailey*, 386 F.2d at 4. Second, since the defense of insanity is "essentially an acknowledgement on the part of society that because of mental disease or defect certain classes of wrongdoers are not properly the subjects of criminal punishment," *Freeman*, 357 F.2d at 625, it seems anomalous to immunize narcotics addicts from other criminal sanctions when Congress has decreed severe penalties for mere possession and sale of narcotics. *Id.* In addition, Congress has dealt with the problem of responsibility of narcotics addicts for their crimes by providing for civil commitment and treatment of addicts in lieu of prosecution or sentencing. *Bailey*, 386 F.2d at 4. *See, e.g.*, 18 U.S.C. §§ 4251-4255 (1976); 28 U.S.C. §§ 2901-2906 (1976).

Finally, what definition of "mental disease or defect" is to be employed by courts enforcing the criminal law is, in the final analysis, a question of legal, moral and policy—not of medical—judgment.[4] Among the most basic purposes

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[4] Speaking of the recent American Psychiatric Association Statement on the Insanity Defense, Professor Phillip E. Johnson notes:

> The APA has not adopted the extreme views of Thomas Szasz, but it has definitely repudiated the ideology of Karl Menninger. The psychiatrists no longer want the criminal law to change to conform to deterministic psychiatric concepts; instead, they regard it as vital to the integrity of their own discipline that "legal or moral constructs such as free will" be understood as outside the domain of psychiatry. They emphatically affirm that most people, including those with sociopathic personality disorders, should be held accountable for what they do. They are not washing their hands of the legal problems, and they believe that the law still needs them, but they understand that

of the criminal law is that of preventing a person from injuring others or, perhaps to a lesser degree, himself. This purpose and others appropriate to law enforcement are not necessarily served by an uncritical application of definitions developed with medical considerations of diagnosis and treatment foremost in mind. *Cf. Powell v. Texas,* 392 U.S. at 540-41, 88 S.Ct. at 2158-59 (Black, J., concurring). Indeed, it would be coincidental indeed should concepts deriving from such disparate sources correspond closely, one to the other. Thus it is, for example, that the law has not greatly concerned itself with medical opinion about such mental states as accompany the commission of crimes of passion or of those done while voluntarily intoxicated; whatever that opinion may be, policy considerations have been thought to forbid its cutting much of a figure in court.

Contravening the broad thrust of the authorities cited above, the panel opinion appears to suggest that "involuntary" drug addiction can constitute a "mental disease or defect" bearing on the defendant's criminal responsibility. 704 F.2d at 747. The panel believed itself bound to that rule by such a holding in *United States v. Bass,* 490 F.2d 846 (5th Cir. 1974). In so concluding the panel acted with obvious reluctance but with fidelity to the principle that one panel of our court does not overrule another. Today, sitting en banc, we overrule *Bass* insofar as it may be read to hold that *mere* drug addiction, voluntary or involuntary, can be a mental disease for legal

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(Footnote 4 continued)
legal and moral decisions are ultimately to be made by citizens, not experts. I regard this newly found modesty as evidence of the profession's increasing maturity, not as a sign of its failure.

Johnson, Book Review, 50 U.Chi.L.Rev. 1534, 1548 (1983) (reviewing N. Morris, Madness and the Criminal Law (1982)).

purposes. Insofar, however, as it countenanced the receipt of evidence of drug addiction in connection with Bass's genuine mental disease—chronic anxiety—to which it contributed, we find no fault with the opinion.

Although mere narcotics addiction is not itself to be acknowledged as a mental disease or defect, evidence of narcotics addiction has been received by some courts as evidence of such an underlying condition. *Green v. United States,* 383 F.2d 199, 201 (D.C.Cir.1967), *cert. denied,* 390 U.S. 961, 88 S.Ct. 1061, 19 L.Ed.2d 1158 (1968). In addition, if addiction has caused actual physical damage to the structures of a defendant's body, evidence of that addiction has been admitted to show any mental defect resulting from that damage. *Cf. Brinkley v. United States,* 498 F.2d 505, 511-12 (8th Cir.1974) (remanding to explore possible physiological and psychological effects of long term LSD use on appellant and whether these effects might amount to insanity).

We view the reasoning of such rulings as *Green* with profound misgivings. To us it seems to rest on the proposition that, assuming drug addiction itself is neither a mental disease nor a defect, yet the two are often to be found in association, so that an addicted person is more likely to suffer from some mental disorder than is one who is not addicted.[5] By a parity of reasoning, since combat veterans as a group are self-evidently more likely to have suffered the loss of a physical member than is the populace at large, evidence of whether a party is a combat veteran should be

[5] See *e.g.,* Gerard & Kornetsky, *Adolescent Opiate Addiction: A Study of Control and Addict Subjects,* 29 Psychiatric Q. 457 (1955); Sutker, *Personality Differences and Sociopathy in Heroin Addicts and Nonaddict Prisoners,* 78 J. Abnormal Psychology, 247 (1971).

received on the issue whether he has lost a leg. Or, to take a less extreme example, since because of light skin pigmentation persons of Scandinavian ancestry are more subject to skin cancer than others, the family tree of a suitor should be received in evidence when his skin cancer is at legal issue. The flaw in both illustrations seems evident: where evidence bearing directly on a legal question is available, that involving tangential matters, even though perhaps logically relevant in theory, is of small practical value.[6]

Our review of numerous records over the course of years has revealed no dearth of experts ready and willing to testify squarely on the issue of insanity in criminal trials: direct evidence on the issue seems all but too readily available. Since this is so, receiving evidence of drug addiction in addition seems to us an exercise seldom likely to prove more probative than prejudicial in practice. See rule 403, Federal Rule of Evidence.[7]

Nor do we see how matters are clarified by reference to the condition of addiction as one involving "psychological damage" to the addict, *e.g., Brinkley v. United States, supra.* As nearly as we can determine, the psychological condition so described is simply one of drug addiction to one degree or another, a condition that we have already declined to view as a mental disease or defect for legal purposes. An actual drug-induced or drug-

[6] Indeed, it may be counter-productive. One might well view with suspicion a claim to have lost a leg made by one who supported it only with evidence that he had served in combat, rather than by lifting his trouser cuff.

[7] We do not suggest that references in testimony to drug use as the cause of or as aggravating particular brain pathology should be viewed as taboo, only that attempts to characterize addiction as itself a mental disease or defect are not to be countenanced.

aggravated psychosis, or physical damage to the brain or nervous system would, however, be another matter.

We do not doubt that actual physical damage to the brain itself falls within the ambit of "mental disease or defect." To refuse to recognize that a congenital microcephalic, or one who has suffered, say, extensive brain damage from a gunshot wound or other physical trauma, may be thereby rendered unable to appreciate the character of his conduct as wrongful would be presumptuous. Here, within the limits of appropriate legal and policy considerations, the medical model must have its day. The same is true of the question whether such organic brain pathology or psychosis can be caused by drugs.

Lyons asserted by his proffer of evidence that his drug addiction caused physiological damage to his brain and that this damage caused him to lack substantial capacity to conform his conduct to the requirements of the law. 704 F.2d at 746. Since he did so, he should—under our subsisting *Blake* test—have been allowed to introduce evidence of any physical brain damage and consequent mental disease or defect. Because the proffer offers evidence tending to suggest such damage, that evidence should have been submitted to the jury. *Blake,* 407 F.2d at 911. And although we today withdraw our recognition of the volitional prong of *Blake*—that as to which such evidence has usually been advanced—we also conclude that should Lyons wish to offer such evidence in an attempt to satisfy the remaining cognitive prong, fairness demands that we afford him an opportunity to do so.

II.

Because the concept of criminal responsibility in the

federal courts is a congeries of judicially-made rules of decision based on common law concepts, it is usually appropriate for us to reexamine and reappraise these rules in the light of new policy considerations. *Wion v. United states,* 325 F.2d 420, 425 (10th Cir.1963). We last examined the insanity defense in *Blake v. United States,* 407 F.2d 908 (5th Cir.1969) (en banc), where we adopted the ALI Model Penal Code definition of insanity: that a person is not responsible for criminal conduct if, at the time of such conduct and as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. *Id.* at 916. Following the example of sister circuits, we embraced this standard in lieu of our former one, defined in *Howard v. United States,* 232 F.2d 274, 275 (5th Cir.1956) (en banc),[8] because we concluded that then current knowledge in the field of behavioral science supported such a result. 407 F.2d at 909, 914-15. Unfortunately, it now appears our conclusion was premature—that the brave new world that we foresaw has not arrived.

Reexamining the *Blake* standard today, we conclude that the volitional prong of the insanity defense—a lack of capacity to conform one's conduct to the requirements of the law—does not comport with current medical and scientific knowledge, which has retreated from its earlier, sanguine expectations. Consequently, we now hold that a person is not responsible for criminal conduct on the grounds of insanity only if at the time of that conduct, as a

[8] The *Howard* standard provided that insanity constituted either the "incapacity from some mental disease or defect to distinguish between right and wrong with respect to the act, or the inability from such disease or defect to refrain from doing wrong in the commission of the act." 232 F.2d at 275.

result of a mental disease or defect, he is unable to appreciate the wrongfulness of that conduct.[9]

We do so for several reasons. First, as we have mentioned, a majority of psychiatrists now believe that they do not possess sufficient accurate scientific bases for measuring a person's capacity for self-control or for calibrating the impairment of that capacity. Bonnie, *The Moral Basis of the Insanity Defense,* 69 ABA J. 194, 196 (1983).[10] "The line between an irresistible impulse and an impulse not resisted is probably no sharper than between twilight and

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[9] We employ the phrase "is unable" in preference to our earlier formulation "lacks substantial capacity" for reasons well stated in the Commentary of the American Bar Association Standing Committee:

> Finally, it should be pointed out that the standard employs the term "unable" in lieu of the "substantial capacity" language of the ALI test. This approach has been taken both to simplify the formulation and to reduce the risk that juries will interpret the test too loosely. By using the "substantial capacity" language, the drafters of the ALI standard were trying to avoid the rigidity implicit in the M'Naughten formulation. They correctly recognize that it is rarely possible to say that a mentally disordered person was totally unable to "know" what he was doing or to "know" that it was wrong; even a psychotic person typically retains some grasp of reality. However, the phrase "substantial capacity" is not essential to take into account these clinical realities. Sufficient flexibility is provided by the term "appreciate."

Commentary (revised November, 1983) to Standards 7-6.1(a) and 7-6.9(b), ABA Standing Committee on Association Standards for Criminal Justice (to be published).

[10] *See also* H. Fingarette, *The Meaning of Insanity* 166 (1972); Wootton, *Book Review,* 77 Yale L.J. 1019, 1026-27 (1968); Statement of David Robinson, Jr., *The Insanity Defense,* Hearings Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 72-73 (1982); Testimony of Stephen Morse, *Insanity Defense in Federal Courts,* Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 211 (1982).

dusk." *American Psychiatric Association Statement on the Insanity Defense,* 11 (1982) [APA Statement]. Indeed, Professor Bonnie states:

> There is, in short, no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred, between the impulse that was irresistible and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment.

Bonnie, *supra,* at 196.[11]

In addition, the risks of fabrication and "moral mistakes" in administering the insanity defense are greatest "when the experts and the jury are asked to speculate whether the defendant had the capacity to 'control' himself or whether he could have 'resisted' the criminal impulse." Bonnie, *supra,* at 196. Moreover, psychiatric testimony about volition is more likely to produce confusion for jurors than is psychiatric testimony concerning a defendant's appreciation of the wrongfulness of his act. APA Statement at 12. It appears, moreover, that there is considerable overlap between a psychotic person's inability to understand and his ability to control his behavior. Most psychotic persons who fail a volitional test would also fail a cognitive test, thus rendering the volitional test superfluous for them. *Id.*[12] Finally, Supreme

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[11] One commentator has noted that no one has ever observed the process of a person losing the capacity for self-control, and "that no one can." Fingarette, *supra,* at 160.

[12] *See also* Statement of Stephen Morse, *Insanity Defense in Federal Courts,* Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 231 (1982).

Court authority requires that such proof be made by the federal prosecutor beyond a reasonable doubt, an all but impossible task in view of the present murky state of medical knowledge. *Davis v. United States,* 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499 (1895).[13]

One need not disbelieve in the existence of Angels in order to conclude that the present state of our knowledge regarding them is not such as to support confident conclusions about how many can dance on the head of a pin.[14]

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[13] John Hinckley is the young man who attempted to assassinate President Reagan in order to attract attention to himself and to impress a movie actress whom he admired from a distance. The subsequent proceedings called into question not only the insanity defense but the rationality of our adversarial jury-trial system. After more than a year of expensive pretrial maneuvering and psychiatric examinations, the lawyers jousted for eight weeks of trial, examining and cross-examining expert witnesses who naturally gave conflicting and confusing testimony on whether Hinckley's obviously warped mentality amounted to legal insanity. The judge instructed the jury to return a verdict of not guilty unless they could agree "beyond a reasonable doubt" that Hinckley was sane. If taken literally, the instruction amounted to a directed verdict of not guilty, considering the deadlock of expert opinion and the difficulty of certifying the sanity of a young man who shot the President to impress a movie star. Juries usually ignore such unpopular legal standards, but the *Hinckley* jury surprised everybody by taking the law seriously and finding him not guilty. Hinckley will now be confined to a mental hospital indefinitely because he is "dangerous," although there is no reliable way to predict what he would do if released and no reliable test to determine if he has been "cured."

Johnson, Book Review, 50 U.Chi.L.Rev. 1534, 1536 (1983) (reviewing N. Morris, Madness and the Criminal Law (1982)).

[14] "What Song the Syrens sang, or what name Achilles assumed when he hid himself among women, though puzzling questions, are not beyond all conjecture." Sir Thomas Browne, URN BURIAL, v.

In like vein, it may be that some day tools will be discovered with which reliable conclusions about human volition can be fashioned. It appears to be all but a certainty, however, that despite earlier hopes they do not lie in our hands today. When and if they do, it will be time to consider again to what degree the law should adopt the sort of conclusions that they produce. But until then, we see no prudent course for the law to follow but to treat all criminal impulses—including those not resisted—as resistible. To do otherwise in the present state of medical knowledge would be to cast the insanity defense adrift upon a sea of unfounded scientific speculation, with the palm awarded case by case to the most convincing advocate of that which is presently unknown—and may remain so, because unknowable.

III.

Thus, Lyons' claim that he lacked substantial capacity to conform his conduct to the requirements of the law will not raise the insanity defense. It would be unfair, however, to remit him retroactively to our newly restricted insanity defense without allowing him the opportunity to plan a defense bearing its contours in mind. Consequently, we vacate his conviction and remand for a new trial in accordance with our new insanity standard. As for other cases, today's holding shall have prospective application only, commencing thirty days from the date of its publication.

VACATED and REMANDED.

ALVIN B. RUBIN and JERRE S. WILLIAMS, Circuit Judges, with whom POLITZ, TATE, and HIGGINBOTHAM, Circuit Judges, join, concurring in part and dissenting in part:

The sole issue raised by the appellant, Lyons, and by the appellee, the United States, is whether iatrogenic narcotics addiction alone may constitute a mental disease or defect sufficient to support the defense of insanity in a criminal prosecution. The court ranges far beyond this narrow issue. It uses this case as a vehicle to reconsider and to redefine the scope of the insanity defense, although such a reconsideration and redefinition was not asked for in the district court or in this court by either of the parties. We are constrained to dissent from the serious misadventure in the judicial process.

We agree with the conclusion the court reaches in part I of its opinion that drug addiction alone is insufficient to support an insanity defense. We reach that conclusion, however, through a different route, which does not require the overruling of *United States v. Bass*, 490 F.2d 846 (5th Cir.1974).

A review of the precedents in this circuit concerning narcotics addiction and the insanity defense must begin with *Bailey v. United States*, 386 F.2d 1 (5th Cir.1967), *cert. denied*, 392 U.S. 946, 88 S.Ct. 2300, 20 L.Ed.2d 1408 (1968). In *Bailey*, the defendants were charged with various crimes relating to the purchase and possession of narcotics. As in Lyons' case, their theory was that addiction is itself a disease or defect that creates a compulsion to procure and to use narcotics, and that one acting under such a compulsion should not be held criminally responsible. *Id.* at 3. Their proffer consisted of their testimony that they were "addicted to narcotics, had been unable to cure [their] addiction, and could not resist the daily use of the [narcotics]." 386 F.2d at 3. At that time this Circuit was still applying the earlier insanity rule, as articulated by the Supreme Court in *Davis v. United States*, 165 U.S. 373,

378, 17 S.Ct. 360, 362, 41 L.Ed. 750 (1897), derived from *M'Naghten's Case,* 8 Eng.Rep. 718 (1843). That test, in essence, exculpates a defendant who, because of mental disability, is incapable of distinguishing between right and wrong, or is unable to control his conduct. *See Blake v. United States,* 407 F.2d 908, 913 (5th Cir.1969) (en banc). While the *Bailey* defendants urged us to adopt the American Law Institute's Model Penal Code standard, we held that the case was not "a proper vehicle for reexamination of [the appropriate insanity standard] for the reason that the issue of criminal responsibility was not raised by the evidence." 386 F.2d at 3.

Our opinion in *Bailey* recognized that, according to the weight of authority, "a mere showing of narcotics addiction, without more, does not constitute 'some evidence' of mental disease or insanity so as to raise the issue of criminal responsibility." *Id.* at 4 (quoting *Heard v. United States,* 348 F.2d 43, 44 (D.C.Cir.1965)). Moreover, we expressed doubt that addiction to narcotics actually deprived the addict of the ability to obey the law: "It would appear that an element of reasoned choice yet exists when an addict knowingly violates the law in acquiring and using drugs. One is not excused for offending simply because he wanted to very, very badly." 386 F.2d at 4. Finally, we noted in *Bailey* that Congress had passed laws designed to assist the criminal offender addicted to narcotics. The Narcotic Addict Rehabilitation Act of 1966,[1] provides for civil commitments of addicts or for sentences requiring treatment. Because Congress had thus acted specifically to define the proper treatment of narcotics addicts convicted of crime, we were reluctant in *Bailey* to fashion a different remedy through the insanity defense. *Bailey,* therefore,

[1] 28 U.S.C. §§ 2901-2906, 18 U.S.C. §§ 4251-4255.

stands for the proposition that narcotics addiction alone is insufficient evidence of a mental disease or defect to raise the issue of criminal responsibility. *Cf. Doughty v. Beto,* 396 F.2d 128, 130 (5th Cir.1968) (evidence of alcoholism, without more, does not create constitutional defense for one convicted of theft).

The majority opinion suggests that *Bailey* may have been limited or overruled by our later decisions in *Blake v. United States,* 407 F.2d 908 (5th Cir.1969) (en banc), and *United States v. Bass,* 490 F.2d 849 (5th Cir.1974). The members of the panel that initially heard this case shared that view, thought the interpretation undesirable, and suggested en banc review to modify or to clarify the holdings of *Blake* and *Bass.* We need not here discuss the exact reach of those two decisions because, sitting en banc, we are not bound by them. Whatever might be their scope as applied to other contentions, however, neither *Blake* nor *Bass* is inconsistent with the *Bailey* court's conclusion that *addiction alone* is not enough to raise the insanity defense. And that is the sole issue pressed before us: that evidence of iatrogenic addiction suffices to require presentation of the issue of criminal responsibility to a jury.

In *Blake* we adopted the Model Penal Code definition of the insanity defense. We did not, of course, discuss whether proof of narcotics addiction of itself would suffice under our newly adopted test. But *Blake* did not qualify *Bailey.* In *Bailey* we expressly refused to consider adopting the Model Penal Code standard, not because we disapproved of it in any way, but because we concluded that under any test narcotics addiction alone was insufficient to constitute insanity and to negate criminal responsibility. 386 F.2d at 3.

Moreover, in *United States v. Tsoi Kwan Sang*, 416 F.2d 306 (5th Cir.1969), decided after *Blake*, we reaffirmed our holding in *Bailey*. We held that the defendant had produced evidence sufficient to warrant submitting the issue of insanity to the jury. We stated specifically that "the opinion of the court...did not conflict with [*Bailey* because]...the evidence of insanity [went] well beyond mere addiction." *Id.* at 310 (on petition for rehearing and rehearing en banc).

United States v. Bass, supra, overruled at least in part by the majority opinion, did not involve a claim of an insanity defense based upon narcotics addiction alone. The defendant suffered from an acutely painful and incurable disease. Around the time of the indictment, Bass had suffered several fevers that, in the opinion of the one doctor, had inflicted temporary brain damage. Bass suffered from "chronic anxiety," and had discussed suicide. We held that he had made an initial showing of insanity sufficient to shift the burden of proof to the government. But we did not rest our holding on narcotics addiction *alone*. Indeed, we did not even rely primarily on narcotics addiction:

> Both treating doctors testified that Bass' *chronic anxiety*, which was caused by an awareness that his disease was incurable and that he would forever be dependent on Demerol for relief from pain, constituted a 'mental disease or defect' as required by the *Blake* test.

Id. at 850 (emphasis added). Our holding in *Bass*, therefore, is not inconsistent with *Bailey*. As in *Tsoi Kwan Sang*, the evidence of insanity went "well beyond mere addiction."

These cases establish a relatively clear standard.

Bailey holds that narcotic addiction alone is insufficient to raise the insanity defense. *Tsoi Kwan Sang* and *Bass* make it clear that addiction, when accompanied by evidence of mental disease or defect, may suffice for an initial showing of insanity.

It thus is well-established in this Circuit, as well as elsewhere, that narcotics addiction alone does not constitute a mental disease or defect for purposes of the insanity defense. If this were not already clearly the law of the circuit, we would join in an unequivocal clarification en banc. But that would not alter the result as to Lyons. The contention he presents is that iatrogenic addiction stands on a different footing from voluntary addiction. Our opinion in *Bass* did not rely on the involuntariness of the defendant's addiction. Because the extent of the mental incapacity represented by narcotics addiction is exactly the same whether voluntarily or involuntarily induced, we see no reason to create a distinction on that basis. As we said in *Bailey,* "[i]t would appear that an element of reasoned choice yet exists when an addict knowingly violates the law in acquiring and using drugs." 386 F.2d at 4.

We do not, therefore, dissent from the basic conclusion reached by the majority in Part I of its opinion that evidence of narcotics addiction standing alone is not sufficient to warrant a trial court's submitting an insanity defense to the jury. Nor, had the argument been made on appeal that the proffer's purpose was to show the existence of a mental disease or defect, to be evaluated under the *Bass* standard, would we dissent from a reversal for the purpose of receiving that evidence. But these statements establish the grounds for our dissent: Having decided the question that disposes of this case, the majority undertakes to examine an issue neither raised in the trial court,

tendered by the parties on appeal, nor suggested by the panel.

This case simply does not require redefinition of the insanity defense. The proffer did submit that Lyons' drug usage might have affected his brain "both physiologically as well as psychologically," and this, conceivably, might be read to suggest the existence of a disease or defect. But Lyons did not make this contention on appeal, and the government did not choose to focus its reply to Lyons' appeal on the impropriety of the existing standard; it chose instead to argue that he had failed to offer evidence sufficient to meet that standard.[2] The government's position was surely correct. Lyons' proffer did no more than state the undisputed conclusion that drug consumption has an impact on the brain's physiology. Were the presence of some effects on the central nervous system dispositive, then every addict would be able to establish an insanity defense. *Cf.* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, (DMS III)* 163 (3d ed. 1980) (individuals who have substance use disorder will, at times, manifest direct acute or chronic effects of substances on the central nervous system). The majority's affirmation of the rule that addiction alone does not invoke the insanity defense therefore disposes of Lyons' appeal.

The majority's strained reading of the record and caselaw hardly justifies its self-appointed mission of redefining the insanity defense. That mission is as unwise

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[2] The government initially confined its arguments to those described above. Once the court's questions and solicitation of amici briefs indicated which way the wind was blowing, however, the government of course reset its sails accordingly and filed a second supplemental brief advocating abolition of the volitional prong. It is also suggesting legislation to accomplish that end. *See* text, post. Given a way to achieve its objective, it will tread either path.

as it is unnecessary. As the government's lawyer observed during oral argument to the en banc court, this is an inappropriate case and an inopportune time for such an exercise.

There is now substantial ferment concerning the insanity defense. See the summary in Dutile & Singer, What Now for the Insanity Defense?, 58 Notre Dame L.Rev. 1104 (1983). Congress is evaluating proposals for change as it considers comprehensive legislation to revise the United States Criminal Code. *See, e.g.*, 41 Cong. Quarterly 633 (1983) (administration proposals). The American Bar Association House of Delegates, at its meeting in February 1983, established an official American Bar Association policy recommending a change in the standards and burden of proof with respect to the insanity defense. 69 A.B.A.J. 426 (1983). A further change in American Bar Association policy is anticipated to be on the House of Delegates agenda at the annual meeting of the Association in August 1984. This proposal would revise or define the words "mental disease or defect". Part II of the opinion for the Court adequately demonstrates additional controversy as to possible modifications of the insanity defense. Considering all of these circumstances, including the possibility of Congressional action, the court's eagerness to depart from the standards that have been adopted in every federal court over almost two decades[3] is especially inappropriate.

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[3] *See United States v. Currens*, 290 F.2d 751 (3d Cir.1961); *Wion v. United States*, 325 F.2d 420 (10th Cir.1963), *cert. denied*, 377 U.S. 946, 84 S.Ct. 1354, 12 L.Ed.2d 309 (1964); *United States v. Shapiro*, 383 F.2d 680 (7th Cir.1967) (en banc); *United States v. Chandler*, 393 F.2d 920 (4th Cir.1968) (en banc); *United States v. Smith*, 404 F.2d 720 (6th Cir.1968); *Blake v. United States*, 407 F.2d 908 (5th Cir.1969) (en banc); *Wade v. United States*, 426 F.2d 64 (9th Cir.1970) (en banc); *United States v. Frazier*, 458 F.2d 911 (8th Cir.1972); *United States v. Brawner*, 471 F.2d 969 (D.C.Cir.1972) (en banc); *United States v.Figueroa*, 666 F.2d 1375

When the evidence in a case squarely raises a question concerning the continued applicability of the volitional test to the definition of insanity, it will be our duty to consider the issue. But the policies embodied in the prerequisites to the insanity defense are too fundamental and too critical to be resolved in the abstract. Considering it sua sponte en banc, the majority demonstrates a complete lack of appropriate judicial self-restraint. Concurring in Part I of the opinion, we would affirm the result reached by the district court. We dissent from all of the obiter dicta that constitutes the rest of the opinion.

Because the majority opinion does redefine the standards that determine criminal responsibility, Judge Rubin will hereafter file a dissent from the adoption of a test that would permit the criminal law to be used to punish persons who lack any ability to conform their conduct to the law, and would thus by judicial redefinition convert our criminal legal system into one of punishment without fault.

JOHNSON, Circuit Judge, dissenting.

This dissent is necessitated by the mischaraccterization of the panel opinion by both the majority and the dissenting opinion of Judges Rubin and Williams; by the mischaracterization of Lyons' contentions on appeal by both opinions; and because of the sincere belief that the Court is here choosing a particularly inopportune time to delve into the quagmire of the insanity defense.

(Footnote 3 continued) (11th Cir.1982) (following *Blake v. United States*). Although the First Circuit has not explicitly taken a position, that court has suggested its approval of the ALI test. *See Beltran v. United States*, 302 F.2d 48, 52 (1st Cir.1962) (citing *United States v. Currens, supra*).

The issue on appeal in the Lyons case was quite clear; it was not whether Lyons was indeed insane. The issue was simply whether Lyons should have been permitted to submit his insanity argument and defense to the jury. The jury, of course, was fully entitled to reject or accept his contentions. The panel concluded that Lyons should have been permitted to submit his argument and defense to the jury under existing precedent and I continue to believe that the existing precedent of this circuit requires such a result.

It is noted at the outset that Lyons' proffer goes far beyond a mere allegation of iatrogenic drug addiction. The majority's and Judge Rubin's and Judge Williams' characterization of Lyons' contentions as alleging *mere* drug addiction is, in my judgment, inaccurate. An examination of Lyons' proffer demonstrates that Lyons' addiction became so extreme that he lost over forty pounds and suffered from drastic malnutrition. The proffer notes that "[h]is decalcified bones had become so brittle that during the course of [a] convulsion, he broke three [3] ribs, three [3] vertebrae, and his left hip was completely torn from the socket." Moreover, Lyons offered to present two expert witnesses, indeed medical witnesses, that would testify that Lyons' addiction had damaged his brain, both physiologically and psychologically.[1]

When Lyons' proffer is viewed in its true form, it becomes clear that he was entitled to submit his insanity defense to the jury under existing precedent.[2] The reasons for this conclusion were set forth in the panel opinion:

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[1] Judges Rubin and Williams concede that Lyons' proffer alleging physiological and psychological brain damage could "conceivably" be read to suggest the existence of a disease or defect. It is submitted that is precisely what the proffer states.

[2] It should be remembered that the law of this Circuit requires a defendant only to produce *slight* evidence of insanity to put the

[T]his Court has held that involuntary drug addiction may constitute a "mental disease or defect" bearing on the defendant's criminal responsibility. *United States v. Bass,* 490 F.2d 846 (5th Cir. 1974). In *Bass,* a case strikingly similar to the case at bar, this Court concluded that evidence of involuntary drug addiction could, and did in the particular circumstances of that case, constitute relevant evidence on the issue of the defendant's sanity. In *Bass,* as in the instant case, the defendant was charged, *inter alia,* with obtaining narcotics by misrepresentation, deception, fraud, and subterfuge. More importantly, *Bass* and the case *sub judice* both dealt with defendants *involuntarily* addicted to the narcotics they illegally obtained. In *Bass,* the defendant had become involuntarily addicted to Demerol as a result of medication treatment aimed at alleviating the defendant's regional enteritis, an acutely painful disease of the lower gastro-intestinal tract. *Bass,* 490 F.2d at 849.

In the instant case, the defendant's proffer indicates that Lyons became involuntarily addicted to pain medication, including Demerol, as a result of medical treatment designed to alleviate the barrage of illnesses suffered by Lyons during the three-year period prior to the commission of the charged offenses. No meaningful distinction between *Bass* and the case *sub judice* can be discerned.[3] In both cases, the

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(Footnote 2 continued)
defendant's mental condition at issue. *See, Blake v. United States,* 407 F.2d 908, 911 (5th Cir.1969) (*en banc*). The *en banc* Court stated in *Blake:* "It follows that if there is some evidence supporting the claim of insanity...the issue must be submitted to the jury. [citations omitted] This means only slight evidence." *Id.*

[3] It is suggested that Judges Rubin's and Williams' attempt to distinguish *Bass* from this case is unpersuasive. Attempting to glean distinguishing factors in *Bass,* Judges Rubin's and Williams' dissent

> defendant embarked upon a course of narcotics use not by choice, but pursuant to doctors orders—orders presumably aimed at treating an admittedly plainful physical disorder. Additionally, in both cases, the defendant offered expert testimony, which, if believed by the jury, would establish that the defendant lacked substantial capacity to conform his conduct to the requirements of applicable law due to his involuntary drug addiction.

United States v. Lyons, 704 F.2d 743, 747 (5th Cir.1983). For these reasons, the reasons which are more fully explained in the panel opinion, it is my belief that Lyons should be permitted to present his insanity defense to the jury under the law of this Circuit.

Having explained why Lyons should have been permitted to submit his case to the jury under the existing precedent of this Circuit, I pause to note my agreement with many of the concerns stated by Judge Gee concerning the existing insanity defense. Even though the present insanity test may be too broad, even though the abolition

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(Footnote 3 continued)
states: "The defendant suffered from an acutely painful and incurable disease. Around the time of the indictment, Bass had suffered several fevers that, in the opinion of one doctor, had inflicted temporary brain damage." In the instant case, Lyons' proffer demonstrates that during the period of his iatrogenic addiction he suffered from and was treated for the following painful disorders: (1) stomach ulcer; (2) internal hemorrhoids; (3) perforated appendix; (4) gunshot wound; and (5) deviated septum. Additionally, Lyons' proffer indicates that he suffered high fevers. Lyons alleged that these facts could be attested to by his wife, employees, his original treating physicial, as well as by the hospital and prescription records. Certainly this, in conjunction with the expert testimony indicating brain damage, constitutes slight evidence of a mental disease or defect. Lyons should have been permitted to submit his case to a properly charged jury.

of the volitional prong might more properly limit the insanity inquiry, and even though this Court's action might align the insanity defense of this Circuit with the current views of the psychiatric school of thought, the timing of this action seems particularly inappropriate. In light of the very real possibility of congressional action on this issue and in view of the undisputed preference for the will of the public to be expressed by that body, it seems particularly inappropriate for this Court to take this action by *en banc* intervention at this time.

APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CRIMINAL ACTION
NO. 81-356-EJB

UNITED STATES OF AMERICA

VERSUS

ROBERT LYONS

REASONS FOR RULING

On May 10, 1982, after having duly considered memoranda filed by the parties and after having heard oral arguments of counsel, we granted the Government's Motion in Limine and now set forth our reasons for such ruling.

Before the court was the Government's Motion in Limine "to exclude testimony and argument concerning the subject of addiction as a defense to the crimes charged in the indictment." Record Document 39 at 1. In its original memorandum, the Government, noting defense counsel's intention to introduce such evidence, cited *United States v. Poolaw,* 588 F.2d 103 (5th Cir. 1979) (affirming a district court's refusal to instruct a jury that chronic alcoholism constituted a mental disease or defect for the purposes of an insanity defense) and analogized chronic alcoholism to chronic drug addiction. The Government cited as persuasive authority *United States v. Moore,* 486 F.2d 1139 (D.C. Cir. 1973), an *en banc* rejection of an addiction defense much like the one advanced by defendant herein.

Counsel for the defendant countered: (1) that *Poolaw* was inapposite to the instant case, which involves no "insanity" defense as such; (2) that *Moore* was really a plurality opinion, in which no one opinion commanded a majority;[1] and (3) that "the right to present evidence of addiction as part of a 'coercion, compulsion, or necessity' defense is widely recognized in the federal courts." Record Document 42 at 1. In support of this last proposition, defendant cited *United States v. McKnight*, 427 F.2d 75, 77 (7th Cir. 1970), *cert. denied*, 400 U.S. 880, 91 S.Ct. 124, and a model jury instruction derived therefrom in Devitt and Blackmar, *Federal Jury Practice and Instructions*, § 58.19.

The court required supplemental memoranda upon a case the parties had failed to unearth, *Bailey v. United States*, 386 F.2d 1 (5th Cir. 1967), *cert. denied*, 392 U.S. 946, 88 S.Ct. 2300 (1968) (federal narcotics defendants not entitled to jury instruction on insanity defense on basis of their addiction). The Government's memorandum urged *Bailey* as well as *United States v. Coffman*, 567 F.2d 960 (10th Cir. 1977) (citing *Bailey* with approval) as dispositive of the issue at hand. The memorandum on behalf of defendant would deny *Bailey's* pertinence (1) because *Bailey*, which used the M'Naughten rule of insanity, was implicitly overruled by *Blake v. United States*, 407 F.2d 908 (5th Cir. 1969) (*en banc*), which discarded the M'Naughten rule in favor of the American Law Institute (A.L.I.) Model Penal

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[1] Defendant additionally argued that the exclusion of evidence was not at issue in *Moore*, where the trial court had denied the defendant's pre-trial motion to dismiss. This attempted distinction can be dismissed out of hand: "...the trial court ruled that [expert testimony on the coercive effects of addiction] would not be permitted...before the jury, apparently on the ground that addiction can never be a defense to a charge of possession of heroin." United States v. Moore, 486 F.2d at 1143.

Code's standard of insanity, and (2) because the defendants in *Bailey* "proffered addiction as a defense of their criminal conduct based solely upon their own unsupported testimony that they were addicts; they not only failed to substantiate their contention regarding addiction, but offered no expert testimony." Record Document 56 at 1. It is precisely the presentation of expert testimony, argues defendant, that is at issue here.

At oral argument on its motion, the Government naunced its position to the effect that the court *could* admit evidence of the defendant's "mere addiction," or even evidence that the defendant was in a narcotic stupor at the time any of the alleged offenses were actually committed (as in a traditional "intoxication" defense) but *not* "opinion evidence" or argument about the coercive effects of "the status of addiction" upon the defendant's mind and will. Record Document 62 at 6-16. Similarly, counsel for the defendant offered refinements of his own: having disclaimed in his initial memorandum that the defense of insanity was at issue herein, and having suggested in his supplemental memorandum that the A.L.I. standard of insanity embraced in *Blake* could accommodate a "merger" of insanity and compulsion defenses, counsel for the defendant at oral argument framed the defense in the language of the A.L.I. insanity defense: "The defense is that [Mr. Lyons] did not, because of mental defect, have the ability to conform his conduct to the requirements of law." Record Document 62 at 24. And again: "depending upon the facts of the case, and we have to put the evidence on for the jury to see the facts..., addiction can be so compelling that a person has a mental defect that prevents them (sic) from conforming to...what the law requires." Record Document 62 at 24-25.

THE AUTHORITY OF BAILEY

Duty focuses the court's most careful attention upon *Bailey,* which has not been so dimmed that it cannot be followed. Counsel for defendant, as noted above, reads the subsequent *Blake* decision as a rejection of the *ratio* of *Bailey,* and sees *Bailey's* ruling as incompatible with the A.L.I. standards of criminal responsibility.

However, the *Bailey* panel, perhaps with one eye on the future, observed that:

> *No court* has accepted what appellant here urge. In *Freeman v. United States,* 357 F.2d 606 (2d Cir. 1966)...the court took care to state that
>
> > "mere recidivism or narcotics addiction will not of themselves justify acquittal under the American Law Institute standards which we adopt today....In light of the severe penalties imposed by Congress for the possession and sale of narcotics, it would be unwise at this stage of medical knowledge for a court to conclude that those addicted to narcotics should be, for that reason alone, immune from criminal sanctions. 357 F.2d at 625."
>
> *Bailey v. United States,* 386 F.2d at 4 (emphasis added).

That these views were cited with approval must be construed to indicate that the Fifth Circuit would also reject an addiction defense under A.L.I. standards.

Moreover, although *Bailey* was directly concerned with addiction as part of an insanity defense, the panel based its decision on policies that were broadly expressed and

seem to foretell the Fifth Circuit's displeasure with an addiction defense of any stripe: "It would appear that an element of reasoned choice yet exists when an addict knowingly violates the law in acquiring and using drugs. One is not excused for offending simply because he wanted to very, very badly." *Id* at 4 (footnotes omitted).

The *Bailey* court also noted

> that Congress has taken a remedial step, having recently provided for civil commitment in lieu of prosecution and for criminal sentencing for treatment of narcotics addicts. Narcotic Addict Rehabilitation Act of 1966, 80 Stat. 1438 (28 U.S.C. Secs. 2901-2906; 18 U.S.C. Secs. 4251-4255). We would not undertake extension of *Robinson [v. California*, 370 U.S. 660, 82 S.Ct. 1417 (1962) (Eighth Amendment violated by state statute making status of addiction a crime)] beyond a line expressly drawn by the Supreme Court, especially when Congress has carefully contrived a procedure for dealing with this grievous social problem. 386 F.2d at 4.

This observation is not unlike the preemption idea in *United States v. Moore, supra*, at 1156: the extent of congressional legislation in the area of drug abuse preempts the court's authority to entertain, let alone to create, a common law defense to a drug-related crime defined by Congress itself.

Finally, counsel for defendant made much of the fact that the *Bailey* record contained "no evidence probative of the contention that addiction eliminates the criminal intent of a narcotics offender," 386 F.2d at 4, because the admission *vel non* of such evidence is the very point disputed in

this motion. Although the issue does not appear to have been addressed by the Fifth Circuit, it has been by the Tenth, and construing *Bailey* at that;

> The legal presumption of insanity (sic) is not destroyed by testimony which does no more than express the idea that a narcotics addict may be influenced by his appetite for drugs to commit a crime to support his habit. Such evidence does not put in issue the mental capacity of an accused. *United States v. Coffman*, 567 F.2d 960, 963 (10th Cir. 1977) (*citing Bailey v. United States, supra*).

There was also a similar evidentiary question in *Moore, supra*, which the D. C. Circuit likewise resolved in favor of the Government. (*See* note 1 *supra*.)

In sum, the court finds that *Bailey's* inner logic, together with its construction by other courts, lead inescapably to the exclusion of evidence on the coercive nature of narcotics addiction.

ADDICTION AND DURESS

Counsel for the defendant has attempted to avoid the thrust of *Bailey* and other "addiction-insanity" cases by styling the defense as one of "compulsion, coercion, or necessity," or some kind of admixture of the compulsion defense and the insanity defense. Counsel for defendant cites *United States v. McKnight, supra*, for the proposition that the addiction-duress issue is for the jury.[2] This authority

[2] Defendant also cites the model jury instruction engendered by *McKnight* in Devitt and Blackmar, *Federal Jury Practice and Instructions*, § 58.19. Two other cases appear in the notes to this jury instruction, United States v. Adcock, 487 F.2d 637 (6th Cir. 1974) and United States v. Clark, 498 F.2d 535 (2d Cir. 1974), but neither case even remotely addressed

is not binding, nor is it particularly convincing, no matter what facet of defendant's chameleon-like theory it is adduced in support of.

First, to the extent *McKnight* might stand for an addiction-insanity defense, it cannot be followed because of *Bailey's* contrary holding. It should also be noted that the *McKnight* defendant relied heavily on evidence of his physical disabilities and attendant pain, rather than "mere addiction." *United States v. McKnight,* 427 F.2d at 77.

Second, although *McKnight* does in fact cite the rule that a compulsion defense poses a fact question for the jury, it mentions no authority at all for the novel proposition that evidence of addiction (or even of physical disability, for that matter) has ever been thought to cast doubt upon a defendant's criminal responsibility.

Third, any reliance which *McKnight* places on *Castle v. United States,* 347 F.2d 492 (D.C. Cir. 1964), is misplaced since the merit of *Castle's* "pharmacological duress" defense were not even reached, let alone recognized.[3]

(Footnote 2 continued)
the admissibility *vel non* of evidence on the coercive nature of narcotics addiction.

[3] To the extent that the majority opinion gives intimations that narcotics addiction per se raises the issue of criminal responsibility, it is not an accurate reflection of our holdings; if that were so, virtually every narcotics case in the courts would have the issue. I assume we can take judicial notice, from hundreds of cases in this court, that the street "peddlers" and "pushers" of narcotics are almost invariably themselves narcotics addicts who are exploited by those who control the narcotics rackets. It is not too difficult to contemplate how much more effectively these unfortunates could be exploited if this court were to equate addiction per se with "insanity," thus opening the door to evading the severe penalties Congress has fixed for trafficking in narcotics. Castle v. United States, 347 F.2d at 496 (Burger, J., concurring).

Finally, addiction cannot be comfortably fit into traditional thinking about the defense of compulsion, necessity, or duress:

> Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. Thus, where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property from flooding, A could claim a defense of necessity....
>
> * * * *
>
> We need not speculate now, however, on the precise contours of whatever defenses of duress or necessity are available....Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail. *United States v. Bailey*, 444 U.S. 394, __, 100 S.Ct. 624, 634 (1980) (citations omitted).

See also United States v. Moore, 486 F.2d at 1178-1181 (Leventhal, J., concurring). It is beyond peradventure that such a "reasonable, legal alternative to violating the law"

was open to Mr. Lyons. The court therefore declines to admit evidence that would frame Mr. Lyons' addiction as part of a compulsion defense.

THE PERSUASIVENESS OF MOORE

In granting the Government's motion, the court is also strongly influenced by two policy considerations announced by the D. C. Circuit in *United States v. Moore, supra,* but not discussed by either party in the motion at bar.[4] To allow the theory urged by defendant herein would open floodgates not only upon the area of narcotics laws, but also upon the entire field of criminal law:

> ...the legally important factor is the resulting loss of self-control. Drug addiction of varying degrees may or may not result in loss of self-control, depending on the strength of character opposed to the drug craving. Under appellant's theory, adopted by the dissenters, only if there is a resulting loss of self-control can there be an absence of *free will* which, under the extension of the common law theory, would provide a valid defense to the addict. If there is a demonstrable absence of free will (loss of self-control), the illegal acts of possession and acquisition cannot be charged to the user of the drugs.
>
> *But if it is absence of free will which excuses the mere possessor-acquirer, the more desperate bank robber for drug money has an even more demonstrable lack of free will and derived from precisely*

[4] Defendant argues that *Moore's* persuasiveness is compromised by the fact that, as a plurality decision, none of its six opinions commanded a majority. Record Document 42 at 1-2. However, it appears that five of the nine judges participating—namely Circuit Judges Wilkey, MacKinnon, Robb, Leventhal, and McGowan—were united in their dissatisfaction with the addiction defense.

> *the same factors as appellant argues should excuse the mere possessor....* If the addict can restrain himself from committing any other illegal act except purchase and possession, then he is demonstrating a degree of self-control greater than that of one who robs a pharmacy or a bank, and thus his defense of loss of control and accountability is even less valid that that of the addict who robs the pharmacy or the bank. *United States v. Moore,* 486 F.2d at 1145-46 (original emphases).

Furthermore, there is not the slightest indication that Congress intended to exempt addicts from the operation of federal drug laws, a point on which the exhaustive concurrence of Judge Leventhal is particularly convincing. *United States v. Moore,* 486 F.2d at 1165-1174 (Leventhal, J., concurring). We cannot forget the cancerous social problems posed by drug addiction:

> We have seen civilizations which reached the carpet slipper stage, and slowly drowsed away beside the fading fires of genius. Ours may be the first civilization to spped the process by the deliberate injection of drugs into our culture; without waiting for the natural sleep of old age, we hasten to evade our feared crushing burdens by permitting those who crave it to slip into an opium haze.
>
> Congress has not ceased to attempt to fashion new ways to deal with these problems of narcotics addiction; hence...it would be unthinkable to write our own new law that might undercut some of these congressional efforts. *Id.* at 1158-59 (footnotes omitted).

New Orleans, Louisiana, this 19th day of May, 1982.

/S/ Signed

UNITED STATES DISTRICT JUDGE

Patrick J. Fanning

Julian R. Murray, Jr.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CRIMINAL ACTION
NO. 81-356-EJB

UNITED STATES OF AMERICA

VERSUS

ROBERT LYONS

ORDER

IT IS ORDERED that trial of this cause is continued to be reset by the court. This continuance is granted upon the condition that within 15 days of May 10, 1982, i.e., on or before May 25, 1982, the defendant file in the Fifth Circuit Court of Appeals his proposed application for supervisory writs of review of our ruling granting the Government's Motion in Limine.

Considering the importance of the issue raised by said Motion in Limine and our ruling thereon and its bearing on the prosecution and defense in this cause, trial of wich, if the proposed defense is viable, would be somewhat protracted, the court finds that the ends of justice served by the granting of the aforesaid continuance outweigh the best interest of the public and the defendant in a speedy trial.

New Orleans, Louisiana, this 10th day of May, 1982.

/S/ Signed
UNITED STATES DISTRICT JUDGE

Patrick J. Fanning

Julian R. Murray, Jr.

APPENDIX "D"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DOCKET NO. 81-356 "EJB"

United States of America vs.

ROBERT LYONS, DEFENDANT

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date—JULY 7, 1982

COUNSEL

☐ WITHOUT COUNSEL—However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of consel.

☒ WITH COUNSEL—Julian R. Murray, Jr., Esq.
(Name of Counsel)

PLEA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☐ NOT GUILTY

FINDING & JUDGMENT

There being a finding of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY

Defendant has been convicted as charged of the offense(s) of VIO: Title 21 USC Sec. 843 (a) (3) 18 USC Sec. 2

INDICTMENT FOR VIOLATION OF THE FEDERAL CONTROLLED SUBSTANCES ACT

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year, as to each of counts 1 through 6. Sentence imposed on counts 1 through 6 are to run concurrently.

IT IS FURTHER ADJUDGED, that as to counts 7 through 12, imposition of sentence is suspended and the defendant is placed on probation for a period of five (5) years. Said terms of probation imposed on counts 7 through 12 are to run concurrently, and are to commence upon the release of the defendant from confinement under the sentences imposed by the Court in counts 1 through 6.

SPECIAL CONDITIONS OF PROBATION

IT IS FURTHER ADJUDGED, that as a special

condition of probation, the defendant is to participate in a drug treatment program as directed by the U.S. Probation Office

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, that the defendant be confined in an institution with a drug abuse program.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge /S/ Signed

☐ U.S. Magistrate Date July 7, 1982